REPORTS

AND

DISSERTATIONS,

IN TWO PARTS.

PART I.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT, IN THE YEARS 1789, 1790, AND 1791.

PART II.

DISSERTATIONS ON THE STATUTE ADOPTING THE COMMON LAW OF ENGLAND, THE STATUTE OF CONVEYANCES, THE STATUTE OF OFFSETS, AND ON THE NEGOTIABILITY OF NOTES.

WITH AN APPENDIX,

CONTAINING FORMS OF SPECIAL PLEADINGS IN SEVERAL CASES; FORMS OF RECOGNIZANCES; OF JUSTICES RECORDS, AND OF WARRANTS OF COMMITMENT.

BY NATHANIEL CHIPMAN,
Late Chief Justice.

SECOND EDITION.

RUTLAND:
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LRR

DISTRICT OF VERMONT, TO WIT.

BE IT REMEMBERED, That on the twenty-first day of January, in the Seventeenth year of the Independence of the United States of America, the Hon. Nathaniel Chipman, of Rutland, in the said District, Esq., hath deposited in this office, the title of a Book, the right whereof he claims as Author, in the words, letters and figures following, to wit:

REPORTS AND DESSERTATIONS,
IN TWO PARTS.

PART I.

Reports of Cases determined in the Supreme Court of the State of Vermont, in the years 1789, 1790 and 1791.

PART II.

Dissertations on the Statute adopting the Common Law of England the Statute of Conveyances, the Statute of Offsets, and on the Negotiability of Notes.

WITH AN APPDNDIX,

Containing Forms of Special Pleadings in several cases; Forms of Recognizances; of Justice Records, and of Warrants of Commitment.

BY NATHANIEL CHIPMAN,
Late Chief Justice.

In conformity to the Act of the Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of Maps, Charts and Books to the authors and proprietors of said copies during the time therein mentioned."

FREDERICK HILL,
Clerk of the District of Vermont.

PART I.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

PREFACE TO THE REPORTS.

I DO not apprehend any apology, for publishing the following reports, to be necessary. In our mode of practice, a doubt lest the principles of some determinations may have been erroneous, ought not to be a reason for withholding their publication. It is well known that the maxims and precedents of the English law do not, with us, apply in all cases. From a difference of Government and a difference of customs, the reason of cases frequently differs. The English common law writers fail us in many instances. It becomes necessary, therefore, to investigate principles, and establish precedents for ourselves. While former decisions rest only in the memory of the judge, overburthened in term, and perplexed with a multiplicity of cases; or in the memory of the counsel, frequently under a powerful bias, in the recollection and statement, little assistance, in establishing uniform principles, can be expected from precedents. Such is the order of Courts and the mode of practice in this State, that the Judges can have little opportunity for deliberation. They are necessitated to form their opinions, as I may say, *in transitu*, and on the urgency of occasion. It is, therefore, of importance to them, and to the public, that they should have an opportuntity of reviewing as well what is wrong as what is right in their decisions. This may enable them to correct their former errors, and, at leisure, to discover those principles of justice, and the exceptions and limitations of each, which might have escaped their utmost sagacity in the hurry of the Circuit. It may assist them, no less, in tracing, establishing and rendering familiar, on every emergency, those permanent principles, of which they had, perhaps, caught only a glance on the occasion.

In the following cases there is but one instance of a difference of opinion with the Judges. It was not practiced for the Judges to give their opinions *seriatim* on those points in which they were agreed. I conceived it necessary to mention this, lest I should be thought to have omitted the arguments of my brethren on the bench.

RUTLAND, September 3, 1792.

PUBLISHERS' PREFACE.

The publishers having had many calls from the legal profession in the State and throughout the country for Nathaniel Chipman's Reports, after having procured a copy, republish them verbatim. The great demand for this report, containing as it does the decisions in the important cases of 1789, 1790 and 1791, can now be supplied.

TUTTLE & CO., *Publishers.*

RUTLAND, February 1st, 1871.

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ORANGE COUNTY.

Dec. adj'd term 1789.

NATHANIEL CHIPMAN, ESQ., *Chief Justice.*

NOAH SMITH, ESQ., and SAMUEL KNIGHT, ESQ., *Assistant Judges.*

STATE OF VERMONT.

vs.

ANNICE.

State vs. Annice.

On an indictment for adultery with one E——.

Farrand, Attorney for the State, produced E——, as a witness to prove the fact.

Buck, for Annice, objected, that no person shall be allowed to testify his guilt or turpitude to convict another.

By the Court.—She ought not, in this case, to be admitted.

Particeps was not admitted to testify.

In the same cause reputation was offered in evidence to prove Annice's marriage.

Court.—In this cause, which is a criminal prosecution, reputation cannot be admitted. Though in an action on the case for *crim. con.* it might be admitted.

Reputation of a marriage not allowed.

Verdict.—NOT GUILTY.

Dec. adjourned term, 1789.

STEDMAN *ex dem.* M'KENZIE,

vs.

J. PUTNEY.

Stedman ex dem M'Kenzie, vs. J. Putney.

Ejectment for lands in Tunbridge, on the second division of the original right of ——.

M'Kenzie vs. J. Putney.

On trial to the jury, it was objected by the defendant's counsel, that it does not appear that the warning for the proprietor's meeting was published according to law; and the clerk has not inserted that the proprietor's meeting was regularly warned. It is not, therefore to be presumed, nor proved *aliund.*

OBJECTION — It does not appear by the proprietor's records that the proprietor's meeting was legally warned.

Court.—The better way is for the clerk to insert the warning in the records, and that the same was published according to law. In which case it will be presumed to be so, *prima facie.*

It is the better way to insert it; but this is not conclusive.

But if it be ommitted, as the publication is not a corporate act of the proprietors, but something preparatory; the records are not so conclusive as other proof. As to the publication itself in the papers, there is no office, no repository, to which application can be made on occasion. Witnesses may therefore be admitted to prove this point.

As the publication is not a corporate act, other proof may be more conclusive.

Buck, for the plaintiff, offered in evidence a vote of the proprietors, reciting a neglect of their committee to make return of the second division, and directing a completion.

The defendant's counsel objected, that the vote was passed since the commencement of this action.

If there was no title at the commencement of the suit, it cannot be aided by anything done afterwards

Court.—If there was no title at the commencement of the suit, it cannot, as to the purposes of this suit, be aided by any subsequent act.

Objection allowed.

Buck, on the part of the plaintiff, moved that he might be allowed to prove, by witnesses, the division, draught, and acceptance.

To which *Jacob* and *Farrand*, for the defendant, objected.

A propretary division under the Statute can be proved by the records only

Court.—Partition can be only by deed, or in the method pointed out by Statute. In the first case, it must be proved by the deed; in the latter, by the pro-

prietor's records. You might as well prove a conveyance by parole evidence, as severance.

Verdict, NOT GUILTY.

Dec. adjourned term, 1789.

ELIJAH PAINE, ESQ.,

vs.

JOEL ELY and JOEL ELY, Jr.

Paine vs. Ely, etc.

This was an action on a bond assigned by the sheriff of Windsor County to the plaintiff, conditioned, that Joel Ely, then a prisoner in the common goal in said Windsor, on execution at the plaintiff's suit, should not depart the liberties of said prison, etc. (in common form). Breach assigned, that the said Joel did depart, contrary to the condition; wherefore, etc.

Bonds given to the Sheriff of W. to indemnify him for letting a prisoner to the liberties of the prison.

Breach, that prisoner departed, etc.

Buck, for the defendants, plead a very lengthy plea in bar, the substance of which was, that after the execution of said bond, viz., on the 29th day of June, 1789, the said Joel Ely made application to Elias Weld, one of the judges of the County Court, for said county, who thereupon issued his citation for the said Paine to appear at on , bofore Elijah Robinson, one of the Judges for the County Court for said County, and John Weld, Esq., Justice of the Peace, to show cause why the said Joel should not be admitted to the insolvent debtor's oath; which citation was regularly served, etc. That on at the said E. R. and J. W. proceeded to examine the said Joel, and did administer the oath, and gave a certificate thereof agreeably to the Statute in such case made and provided: That the said Joel thereafter remained within the said prison and the liberties thereof, for the space of twelve hours. That no provision being made for his support, as directed by the Statute, he departed. That until that time he had kept within the liberties of the

Plea.—That the prisoner, one of the now defendants, J. E., was discharged under the act for regulating goals and goalers.

Pa'ne vs Ely, etc.

said prison, according to the condition of the said bond.

To this there was a demurrer and joinder in demurrer.

Demurrer.

By HUTCHINSON *and* JACOB, *for the plaintiff*, it was argued that the statute in this case has erected a summary jurisdiction, that the justices derive their authority solely from this statute, that they must pursue their authority precisely as pointed out by the statute, otherwise the whole is *coram non judice*. The statute requires that on application of a debtor confined, etc., to two Justices of the Peace, one of whom shall be Judge, etc., they, or either of them, shall issue a citation to the creditor or creditors at whose suit, etc., notifying them to appear before such Justices, at a time and place therein mentioned, to show cause, etc. That the citation in this case was not issued by the Justices who administered the oath, or either of them—therefore they had no jurisdiction. One set of Justices are not empowered by the statute to convene the creditors before another set of Justices.

Counsel for plaintiff.

Buck for the defendants.

The statute, as it provides for the relief of poor debtors, is remedial, and ought to be construed liberally. E. W. had a right to issue a citation; E. R. and J. W. are such Justices as have a right to hear, examine, and administer the oath. There cannot, therefore, be a want of jurisdiction, as argued by the plaintiff's counsel.

Counsel for defendants.

It is likewise a case against bail, who ought to be favored. It would be hard that either bail or principal should be accountable for the doings of the Justices. Their proceedings, if irregular, ought to be reversed, but, until reversed, ought to be deemed valid—otherwise sheriffs and goalers, who are no judges in this

matter. may also be exposed. It was also insisted "that such Justices," in the statute does not mean the same Justices who issued the citation, but similar Justices. Had it intended the same Justices, the word "aforesaid" had been used. Paine vs. Ely, etc.

The plaintiff's counsel in reply.

This is not a remedial statute. If it gives a privilege to the debtor, at the same time it takes away the common law right of the creditor. It is a rule that all summary jurisdictions must confine themselves strictly to their powers. Neither writ of error nor certiorari will lie. If advantages cannot be taken of the irregularity in this way, the creditor has no redress, be the proceedings ever so illegal and unjust. They therefore prayed judgment for the plaintiff. Counsel for plaintiff in reply.

The *Chief Justice* delivered the unanimous opinion of the Court. Opinion of the Court.

The statute in question gives a privilege to the debtor, in derogation of the common law right of the creditor—the right of holding the debtor in custody until he obtain legal satisfaction. This priviledge is given to the debtor, not for his own sake, but for the sake of the public, who are interested in his labor, and in favor of humanity. The debtor does not demand a remedy against the creditor for an injury he has sustained. The statute is not, therefore, in a law sense, remedial; but the case does not turn on this point. The question is whether there has been any fatal irregularity in the proceedings of the Justices, and whether the plaintiff is proper here to take advantage of the irregularity, if any. The statute is in derogation of the common law right. It is not in a law sense remedial.

The jurisdiction of the Justices, in the case under consideration, is in derogation of the jurisdiction of the common law courts, the proceedings are summary, not The jurisdiction given to the Justices in this case is to be taken strictly.

Paine vs. Ely, etc.

warranted by the course of common law proceedings but warranted solely by the statute. Blackstone ob-

Black. Com. vol. 3, p. 85.

serves, after Sir Edward Coke, that "Particular jurisdictions, derogating from the general jurisdiction of the Courts of common law are ever taken strictly, and cannot be extended farther than the express letter of their privileges will warrant." This observation is applicable to the mode of proceeding in the case under consideration, as well as to the jurisdiction

The mode pointed out by the statute must be strictly pursued.

of the Justices. The mode is pointed out and regulated, not by the common law, but solely by the statute, and must be strictly pursued. A different mode cannot be adopted, under pretence of its being more convenient for the debtor, or for the Justices. This would be to assume an arbitrary power not warranted by law. In this case there has been clearly a deviation from the mode prescribed. The words of the statute, so far as

Words of the Statute.

relates to the present question, are, "on application to two Justices of the Peace, one of whom shall be a Judge, etc., they, or either of them, shall issue a citation to the creditor or creditors, at whose suit the prisoner is confined, notifying him or them to appear before *such* Justices, etc." The word "*such*" is here a relative, referring to the *Justices*, to whom application has been made, and who have issued the citation, and has precisely the meaning of this expression,

"Such Justices," means the same Justices.

"the same Justices, to whom application shall have been made, as aforesaid." In the same sense the word occurs not less than ten times in this paragraph.

Absurdity of the other construction.

To give it the construction contended for by the defendants counsel, would run the statute into absurdity and nonsense, thus: "On application to two Justices, etc., they, or either of them, shall issue a citation to the creditor or creditors, etc., to appear before some suchlike Justices, etc., which citation shall be served

Paine vs Ely, etc.

" on some suchlike creditor or creditors, at least twenty " days before the time of appearance in some suchlike " citation, etc." It is clear from the statute that E. W. had no power to issue a citation to the creditor to appear before any Justices, of whom he was not to be one. This jurisdiction is not incident to the office of Justice, but is given by the statute to those to whom application is made. It might have been given to any other class of men, as, for instance, to any two Freeholders to whom application shall be made. Had that been the case, no one would have thought that one Freeholder might have cited the creditor to appear before other Freeholders.

This jurisdiction is not incident to the office of justice.

The consequence is, that the proceedings of E. R. and J. W. are wholly irregular.

Proceedings are irregular.

The only remaining point is, whether the plaintiff is proper to take advantage of such irregularity here, before reversal.

" There is great difference between erroneous pro- " cess, and irregular (that is, void) process; the first " stands valid and good, until it be reversed. The " latter is an absolute nullity from the beginning; the ' party may justify under the first, until it be reversed; ' but he cannot justify under the last, because it was " his own fault that it was irregular and void at first."

3. Wilf, 345. Parsons vs. Lloyd. 2. Black. Rep 845, S. C.

The citation was irregular; the whole proceedings are, therefore, void from the beginning, and do not stand in the plaintiff's way. Besides there is no mode of reversal in this case.

The proceedings are void.

The bondsman is entitled to no particular favor; he has engaged against the default of the principal; to admit any excuse for him, which would not equally avail the principal, would be to deprive the sheriff or the creditor of their indemnity.

The surety is entitled to no more favor than the principal.

As to the principal, every man who procures a pro-

See the above case of Parsons v. Lloyd, in fine

Paine vs. Ely, etc.

cess (or, indeed, any proceeding at law) in his favor, must see that it be regular, at his peril.

There must therefore be

JUDGMENT *for the Plaintiff.*

Dec. adjourned term, 1789.

OLIVER.

vs.

CHAMBERLAIN, *Sheriff.*

Oliver vs. Chamberlain.

Escape on *mesne* process, for suffering one Gile, arrested at the suit of Oliver, to go at large. On *not guilty*, it appearing that Gile had absconded and was insolvent, the jury found for the plaintiff his whole debt in damages.

2. Ld. Raym., 1411. Powel vs. Hord.

Before the Court rendered judgment, they directed the plaintiff to enter into a rule, that the defendant, Chamberlain, should have the benefit of the judgment, which had been obtained against Gile, the defendant indemnifying the plaintiff from cost, which was done accordingly, and judgment was rendered for the plaintiff for the whole of his debt.

WINDSOR COUNTY.

Dec. adjourned term, 1789.

PARKER

vs.

PARKER.

Parker vs. Parker.

PETITION FOR DIVORCE.

Exception was taken, that the citation in this case was not signed by a Judge of this Court, but by a Justice of the Peace.

Citation in a petition for a divorce must be signed by a Judge of the Court.

Petition dismissed.

STATE OF VERMONT

vs.

JOHN MARSH, ESQ.

Dec. adjourned term, 1789.

State vs. Marsh.

This was an indictment against the defendant, John Marsh, for assaulting Joseph Marsh, constable for the town of H., in the execution of his office, and rescuing a horse taken by distress on a warrant for taxes. The defendant plead the general issue, not guilty.

Indictment for opposing a constable.

For the defendant, it was insisted that Joseph Marsh was not legally appointed to the office of constable. The votes, as it appeared in evidence, for this and other officers chosen at their annual town meeting, being given in to the clerk, *viva voce*, which had been their usual mode, whereas, by the 31st Section of the Constitution of this State, "All elections, whether by the people, or in the General Assembly, shall be by BALLOT, free and voluntary."

Defence—That the constable was not legally chosen.

That he was chosen by votes given viva voce

That he ought to have been chosen by ballot.

The chief Justice, in his charge to the Jury, gave his opinion on this point, in which the other Judges fully concurred.

Charge to the Jury.

Whether the clause in the Constitution insisted on for the defendant extends to the choice of officers in

Parker vs. Parker.

towns and lesser corporations, must be determined, 1st by considering the subject matter; and 2d, by comparing it with other parts of the Constitution. The framers of the Constitution were forming a plan for the general government of the State. They do not appear to have had an eye to the internal regulation of lesser corporations. In this section they point out the mode of electing the officers to the general government, and in this view they confine it to elections by the people and General Assembly. "*The people*," here means the collective body of the people, who have a right to vote in such elections, and is used as synonymous to "*Freemen*."

The 31st section of the Constitution does not extend to the election of town officers.

The word "*Election*," when the choice is to be by the people or freemen, is, in every part of the Constitution, used in the same appropriate sense; as in the 7th Section, "In order that the Freemen of this State "may enjoy the benefit of elections as equally as may "be, each town within this State may hold elections "therein." For what purpose? For the choice of Representatives. In the 10th Section: "On the day of election for choosing Representatives, etc."

I am, therefore, clearly of opinion, that the 31st Section of the Constitution does not extend to the choice of town officers, and is to be laid wholly out of the case under your consideration.

The above section to be laid out of the present case.

The Jury found the defendant *guilty*.

Dec. adjourned term, 1789.

STATE OF VERMONT.

vs.

MATHER.

State vs. Mather.

Indictment for burglary—for breaking and entering the house of ———, at ———, on ———, between the hours of twelve at night, and nine of the evening succeeding.

State vs. Mather.

Indictment for burglary quashed for want of a noctanter.

On demurrer, exception was taken to the indictment for want of a noctanter; that it was uncertain, from the indictment, whether the facts were committed by night or by day, and of this opinion were the Court, and quashed the indictment.

Dec. adjourned term, 1789.

——— *ex dem.*

GIDEON CHAPIN

vs.

A. SCOTT.

Chapin vs. Scott.

Ejectment for lands in Weathersfield.

If plaintiff, in ejectment, demand the whole yet he may recover for a part.

1 Bur., 326. Den ex dem Burges verses Purvis, et al.

It was objected that the plaintiff had proved a title to no more than three-fourths of the land in question; that, as he had demanded the whole, he had failed in his proof. But, by the Chief Justice, and agreed by the Court, in ejectments the plaintiff shall recover according to his right. If the whole be demanded, the Jury may find for a moiety, and it is good.

Dec. adjourned term, 1789.

D. MORRISON & P. FREEMAN,

vs.

W. SHATTUCK, J. BOND, R. RICE & A. SAWYER.

IN CHANCERY.

Morrison and Freeman vs. Shattuck, et al.

This was a Bill in Equity, setting forth that in the year of our Lord, 1752, W. Williams, Esq., of Pittsfield, in, etc., by virtue of a deed duly executed by —— Coates, now of ——, the original proprietor, was seized in his *demense*, as of fee of and in the right No. 1, in Halifax, in the State of Vermont. That in the same year the said W. Williams, by deed under his hand and seal, duly executed, conveyed the right No. 1, to Hugh Morrison, of ——, now deceased. That

Substance of the bill.

Morrison and Freeman vs. Shattuck, et al.

from the time of the said W. Williams' said purchase' until the year 1783, he was possessed of a good deed from the said Coates to himself, of the same right. That on the 15th day of May, 1754, the said Hugh Morrison, by deed under his hand and seal, duly executed, conveyed the said right to John Morrison, then of ——, who, on the 29th day of February, 1788, by deed under, etc., conveyed the said right to your orators (except 100 acres on the west side of said right).

And the said orators further show, that the deed from the said Coates not being recorded, William Shattuck, of ——, in April, 1783, by misrepresentation, obtained it from the said W. W. That the said W. S. knowing that the said H. M. had a deed from the said W. W. and the said J. M., from the said H. M., of the said right No. 1, with an intent of defrauding the said J. M. for a trifling consideration, on the 26th day of June, 1783, obtained a deed from the said Coates to himself, and gave up to the said Coates the deed given to the said W. W., as aforesaid, the said Coates being then incapable of transacting business. And the said orators further show, that the said W. S. afterwards sold the said right No. 1, to Jonas Bond, of G., who, in September, 1786, sold 200 acres, part of said right, to Reuben Rice and William Rice, of ——; and the 1st day of March, 1787, the said J. B. sold 50 acres, part, etc., to James Knapp, and in December, 1787, sold the remainder to Abner Sawyer, of ——.

That the said J. K. claims no part of the right conveyed to the orators.

That the said R. R., W. R. and A. S. had brought an action of ejectment for the said right, against the orators, which is now depending, and that they are without remedy, save in this Court, etc.

Morrison and Freeman vs. Shattuck, et al.

They therefore pray an injunction to stay proceedings at law. That the said deed from Coates to W. S. may be set aside, and the said R. R., W. R. and A. S. may be ordered to release to the orators, or grant such other relief, etc.

Three defendants demur.

To which bill the defendants W. R., R. R. and A. S. demurred, not confessing, etc.

Fourth defendant demurs seperately.

W. Shattuck, the other defendant, also demurred severally.

The defendants W. R., R. R. and A. S. were first heard on the demurrer.

Counsel for the three defendants.

For these defendants, it was insisted, that by the plaintiff's own showing, the defendants have not been guilty of any fraud. They have purchased the title *bona fide*, without notice of any equity in another. At the time of their purchase, there was no pretence of right in the plaintiffs, who have since purchased and revived a dormant claim. The persons, under whom the plaintiffs claim, were negligent in not recording the title deed. Whatever equity H. M. might have had against W. S., yet neither H. M. or the present plaintiffs could have any against these defendants.

Plaintiff's Counsel.

For the plaintiffs it was urged that the Court will assist in mending defective conveyances, and even supply a deed that has been destroyed. It is immaterial what parties are concerned; its being sold by W. S. can make no difference. It might have passed through several hands before W. Shattuck's fraud was known. The vendee cannot be in a better situation than the vendor. The title of W. S. being void by reason of fraud, the subsequent or derivative titles must likewise be void.

Per Cur:

These defendants are set up in the bill to have purchased of W. S., they are not charged with fraud

Morrison and Freeman vs. Shattuck, et al.

personally, or even with notice of the title, under which the plaintiff's claim. They are, therefore, to be taken to be *bona fide* purchasers without notice. It has been long settled, that if A. sells to B., who forgets or neglects to register his deed, and C., knowing the same, purchases the same land from A., and first registers his deed, and sells to D., who purchases *bona fide* for a valuable consideration, without notice of B's. right; D. shall not be affected by C's. notice, but he shall hold against B.

1 Bur. 474. Worley, et al., assignees of Slader, vs. Demattos & Slader.

Bill dismissed as to the three defendants, with costs agst. the plaintiffs.

The bill as to the defendants W. R., R. R. and A. S. must be dismissed, with costs against the plaintiffs.

Fourth defendant's Counsel.

For the defendant W. S., it was argued that the plaintiffs, at the time of the fraud alledged, owned nothing; they are to be considered as purchasers of a mere equity, which will not entitle them to maintain this action; that neither were, in fact, in possession.

Plaintiffs' Counsel.

For the plaintiffs it was said, that any subsequent purchaser had a right to disencumber.

Per Cur:

The plaintiffs do not stand in the place of heirs or representatives of H. M. H. M. had been defrauded of his title to the land in question; after which, and with notice (since it is not denied, and they are supposed to make the best of their own case) the plaintiffs have purchased. The injury was not done to them; they have no right, in their own names, to a remedy in this suit.

Bill dismissed as to the fourth defendant, but without costs.

The bill, as to the defendant, W. S., was dismissed, but without costs.

Judge Knight did not sit in this case, having been of counsel for the defendants.

WINDHAM COUNTY.

Dec. adjourned term, 1789.

HAVENS

vs.

GRIFFIN.

Havens vs. Griffin.

The declaration consisted of two counts, 1st, on an order accepted; 2d, for money had and received.

It appeared in evidence, that at ———, on ———, the plaintiff and defendant, and one, Sever, were in company. The plaintiff was endeavoring to procure payment on a small note, which he held against Sever. The defendant said, "Get an order on me, and I will pay it." Sever drew an order on G., the defendant, for the amount of the note, and H., the plaintiff, gave up the note. H. then turned to G. and said, "Here will you pay it?" G. replied, "Give me the order." Took it, and wrote on it that he would pay it when he, G., should collect so much of one Taylor, against whom he had a demand in favor of Sever. H. said it was not the agreement. G. said, "It will not hurt you."

For G. it was insisted that he was bound by the written acceptance only; and as he had collected nothing of Taylor, he was not bound to pay.

An agreement to pay an order to be drawn, shall bind after the draft made.

But the Court held that G. was bound by his agreement to pay unconditionally; that he could not afterwards accept to pay in a different manner, or on contingency.

Accordingly there was a

Verdict for the plaintiff.

Addison County.

August Term, 1790.

DARIUS STODDARD

vs.

LEVI ALLEN.

Stoddard vs. Allen.

Debt on a judgment obtained by D. S. against L. A., by default, in the County of Litchfield and State of Connecticut.

There was, 1st, a plea of *nil debet*; 2d, an offset.

Foreign judgment impeached.

The Court (Judges Smith and Knight on the bench) allowed the defendant to impeach the original judgment, so far as to show that more was recovered than was, in fact, due.

N. B.—This goes no further than foreign judgments on default.

Bennington County.

August term, 1790.

SELECTMEN OF BENNINGTON

vs.

M'GENNES.

Selectmen of Bennington vs. M'Gennes.

Indebitatus assumpsit, for money laid out and expended.

Non assumpsit pleaded.

Action to recover back money advanced by the town for the relief of a pauper.

It appeared in evidence, that in the year ——, the defendant was resident at Bennington, but not an inhabitant. The defendant, his wife, and two or three children were taken sick, and in very distressed circumstances, being poor and unable to provide for themselves; the Selectmen of Bennington provided for them as paupers, and advanced, for their relief, the sum demanded in the declaration. The wife, and one or more of the children died. The defendant, on his recovery, removed out of the State. Returning afterwards, on business, the present action was brought.

One of the plaintiffs in the writ, a Selectman, not admitted as a witness

A motion was made, that one of the plaintiffs, a Selectman, might be sworn to prove a special agreement of the defendant to repay.

By the Court—He cannot be admitted.

Charge to the Jury.

The Chief Justice, in his charge to the jury, observed:

This action is the first of the kind.

That this was an action, the first of the kind which he had ever known; an action brought by the town against a pauper, to recover back money expended for his relief. There is, in this case, no special agreement to repay. It rests on the general implication of law in such cases. As the money was advanced, if the law implies, generally, an obligation on the part of the

Selectmen of Bennington vs. M'Gennes.

pauper to repay such monies, as the town may have advanced for his relief, then the plaintiffs ought to recover. This may be gathered from the intention of the law, in the provision made for the relief of the poor.

It rests on the general implication of law.

The provision made by law for the relief of the poor is, in my opinion, a charitable provision. To consider it in any other light, detracts much from the benevolence of the law, and casts a reflection on the humanity of the richer part of the community. Povety and distress give a man, by law, a claim on the humanity of society for relief; but what relief, if the town have a right immediately to demand repayment? and to imprison the pauper for life, in case of inability to pay? This, instead of a relief, would be adding poignancy, as well as perpetuity to distress. If this be so, certainly the law raises no promise.

The provision made by law for the poor, is a charitable provision.

If so, the law implies no promise.

Verdict for the defendant.

August Term, 1791.—On a review, the defendant again had a verdict.

WINDHAM COUNTY.

August term, 1790.

DAVID LYON

vs.

JOSEPH IDE.

Lyon vs. Ide.

The plaintiff declared, as assignee of the Sheriff of Windham, on a bond given to the Sheriff by the defendant, in the penalty of £200, that if one Joseph Bullen, then a prisoner confined for the plaintiff's debt, should behave as a good orderly prisoner ought to behave, and should pay to the Gaoler one shilling and sixpence per day for his victualing, and pay the Gaoler's fees, and not depart said prison without the leave and liberty of the Sheriff; then, etc.

On a bond given to the Sheriff of W., for letting a prisoner to the liberties of the prison.

There were three several pleas in bar, by Bradley, for the defendant.

To the first and third pleas there was a traverse and issue; to the second, which for substance was, that the bond was taken for letting the said Bullen to the liberties of the prison, that it was taken by the Sheriff, in his own wrong, *colore officii*, for other things than the law allows, viz., for the prisoner's good behavior, for his diet, and to secure the Gaoler's fees, and that he should not depart without leave of the Sheriff, etc., there was a demurrer, and joinder in demurrer.

Plea that the bond was taken by the Sheriff in his own wrong, colore officii, for matters other than the law allows.

Demurrer.

The demurrer was argued by Bradley for the defendant, and by Brother Knight, for the plaintiff.

After consideration, the *Chief Justice* delivered the opinion of the Court:

Opinion of the Court.

This is an action on a bond taken by a Sheriff in the execution of his office, for lettng a prisoner, confined in gaol for debt, to the liberties of the gaol-yard, under

Lyon vs. Ide.

the statute regulating gaols and gaolers, and by the Sheriff assigned to the plaintiff, the original creditor.

As the bond and condition are inserted at large in the declaration, and as the final recovery, in this action, will depend on the legality of the bond, it will be unnecessary to consider the defendant's plea. For, on this demurrer, if the declaration be not good, or, in other words, if the bond be illegal, the plaintiff cannot recover in this action; and nothing is disclosed in the defendant's plea, but what is apparent on the face of the declaration.

The question turns on the legality of the bond.

A person, acting in his private capacity, may annex what conditions he pleases, to his agreement; so that they be not *mule in fe*, or prohibited by some positive law. But a person acting under authority must pursue that authority; nor can he act by virtue of his authority, and in his private capacity, in the same instrument. I, however, at present, extend this no farther, than to ministerial officers of the law. Any person imprisoned for debt may be admitted to the liberties of the gaol-yard, on procuring sufficient bonds to indemnify the Sheriff, that is, to indemnify him against an escape, which might, in such case, be made; for a prisoner, admitted to the liberties, can escape when he pleases. The law cannot mean, in this case, to indemnify the Sheriff, or the Gaoler, who is his deputy, for anything furnished the prisoner on a private agreement.

A person acting by virtue of an authority, must pursue that authority.

The end of the bond is only to indemnify the Sheriff.

Neither the Sheriff nor the Gaoler are obliged to furnish prisoners with diet; nor is the prisoner obliged to receive his diet from them, or either of them. So far from this, that the statute before mentioned expressly declares, that all prisoners shall be allowed to provide, and send for the necessary food, from whence they please.

The prisoner is not obliged to take his diet of the gaoler.

No officer can be allowed to take a bond, or any re-

Bonds for ease or favor not allowed.

Lyon vs. Ide.

ward, for ease or favor, other than such as are expressly allowed by law. Such a practice, were it to obtain, would open a wide door to extortion, and the most grievous oppression; and an officer is clearly punishable, who shall, under color of his office, and for doing that, which the law obliges him to do, as to take bail, etc., take money from a prisoner, other than legal fees, or any service, either for his own benefit, or that of a third person; and every agreement, extorted for such purposes, must be illegal and void.

Officer punishable for taking more than legal fees.

Agreements for such purpose void.

The bond under consideration is of the same nature, and is grossly oppressive. There is not one word about indemnifying the Sheriff—the only thing required by the statute. Instead of that, he is first bound to his good behavior; and though he ought to behave well, the Sheriff had no right to demand it of him under a penalty. 2. He is bound to pay the Gaoler one shilling and sixpence per day for his victualing—a most extravagant price in this country. This is directly in face of the statute, as it is a mean of obliging the prisoner to take his food of the Gaoler only. 3. He is obliged to pay the Gaoler's fees. The Gaoler, who took this bond in the Sheriff's name, had a right, if fees were due, to take security for their payment; but, if he agreed to wait, and take them at a future day, it was a private concern, which ought not to have been put into this bond, taken officially. He might as well have taken security for any other debt in the same way. 4. He is bound not to depart without leave of the Sheriff; the Sheriff is authorized to detain the prisoner until he pay and satisfy the debt for which he stands committed, and lawful fees. When he has done that, though in close confinement, he may demand his liberty, and if not presently set at large, an action lies against the Sheriff; and yet, in such case, if this bond be

This bond is grossly oppressive.

It binds the prisoner to his good behavior.

To pay the gaoler 1s. 6d. per day for his diet.

To pay the Gaoler's fees.

It was not proper in this bond to secure payment for fees.

Prisoner bound not to depart without leave of the Sheriff.

He need not wait the Sheriffs leave after payment of debt and fees.

Lyon vs. Ide.

good, should he depart without leave of the Sheriff, he forfeits £200. The bond is, therefore, totally bad, as being against law, the common principles of right; and, in every view, highly oppressive. The consequence is that there must be

Vide, Divi verfus Manningham. Plowden

Judgment for the defendant.

September term, 1790.

CLARK

vs.

CAMPBELL.

Clark vs. Campbell.

This was an action removed into this Court by certiorari.

Campbell, the plaintiff below, brought an action before Mr. Justice Burt, against Clark, on a recognizance for the sum of ten pounds, conditioned to prosecute a certiorari, formerly taken out by Clark against Campbell, and not prosecuted. An exception was taken, in the Court below, that the cause exceeded the jurisdiction of a Justice of the Peace, which was over-ruled, and judgment rendered for £3 4s. 6d.

Declaration in debt on a recognizance in the sum of £10 for a less sum, viz., £3 4s. 6d.

In this case the plaintiff (below), Campbell, declared in debt for £3 4s. 6d., setting forth the recognizance for £10, with the condition to prosecute to effect, and answer damages and costs, etc., and avered that his costs and damages amounted to £3 4s. 6d.

To this there was a demurrer and joinder in demurrer.

West for Campbell.
Bradley for Clark.

The Chief Justice delivered the unanimous opinion of the Court, in effect as follows:

Opinion of the Court.

The decision in this case will virtually determine whether the Justice had jurisdiction in this cause. For

Clark. vs. Campbell.

if the plaintiff below can support a declaration in debt, for a less sum than that which is contained in the recognizance, on an implied covenant in the condition of the recognizance, the action will come within the jurisdiction of a Justice, otherwise not.

It is said that the conusee is not obliged to go for the penalty, but may go upon a covenant implied in the condition; and, that in debt, "*Id certum eft quod certum reddi potest,*" that is certain, which is reducible to certainty. That the costs are legal costs, and are capable of ascertainment by a known standard, the fee bill. But this is not so. The defendant on the plaintiff's failing to prosecute, is entitled to be paid for his time spent, and money necessarily expended in preparing for his defence. The damages are wholly at large, and are to be ascertained by assessment, (if he goes for damages only) as in an action for an escape on mesne process. Debt may, indeed, be brought on an instrument which does not, in itself, ascertain the sum due; but, in that case, there must be, in the instrument, a reference to some other instrument, where the sum is ascertained, to some known rule of computation, or to an assessment made by some third person or persons; so, that when the instrument referred to is produced, the rule applied, or the assessment shewn, the quantum of the demand will appear the same to every one. We do not say no action can be brought for a sum less than the penalty; but we are all clearly of opinion that a declaration in debt, on the condition, cannot be made good by any reference or averment in this case. Therefore let there be

If the plaintiff goes for damages, they are in this case, to be ascertained only by assessment.

Rule in debt, where the sum is uncertain.

Declaration in debt, on the condition cannot, in this case be made good by averment.

Judgment for the defendant Clark.

WINDSOR COUNTY.

September term, 1790.

Ivers vs. Chandler.

IVERS, *ex dem.*
IVERS
vs.
T. CHANDLER.

This was an ejectment for lands in Chester. On trial, Ivers, the lessor, derived a title by deed, from T.

Plaintiff's title.

Chandler, sen., dated March 13th, 1767. T. Chandler, jun., produced a deed of the same land, from T. C.,

Defendant's title.

sen., dated July 30th, 1766. There was endorsed a proof, by one of the witnesses, before a Judge Lord, who had long been in a state of insanity, and now is dead.

It was strongly insisted that the deed was a forgery, and there were many suspicious circumstances.

Fraud in concealing a title.

It farther appeared in evidence that T. C., the defendant, was present at the time of Iver's purchase, and that he was a witness to his deed, and received part of the pay to his own use.

The Court directed the Jury, that if they found the defendant's T. C's. deed was originally made *bona fide*, yet if they found that the defendant, T. C., was knowing to Ivers' purchase, a witness to his deed, received part of the purchase money, and fraudulently concealed his own claim, they ought not to allow so gross a fraud to prevail against a *bona fide* purchaser. It ought, by a retrospect, to be considered as originally fraudulent, and designed for an imposition.

Berryford vs. Millward. 2 Atk. 49.

The Jury accordingly found for the plaintiff to recover.

L. R. MORRIS, *ex dem.*

LUDLOW

vs.

JOHN GILL.

September term, 1790.

Ludlow vs. Gill.

Ejectment for lands in Weathersfield, originally granted to H. Wentworth, H. W. conveyed to G. Alexander, the 9th of April. 1767; G. A. to Ludlow, 6th June, 1767. H. W.'s deed to G. A., proved and recorded May 12th, 1787, and also the deed to Ludlow, as appeared in evidence on the part of the plaintiff.

Plaintiff's title

On the part of the defendant, a deed was produced from H. W. to E. Bean, dated 28th Dec., 1780, acknowledged and recorded soon after. 2d. A deed from E. Bean to Gill and others, dated Dec. 28, 1781, acknowledged and recorded.

Defendant's title.

It was proved on the part of the plaintiff, that Bean, and the purchasers under him, had some time before Bean's purchase from H. W., full and repeated notice of Ludlow's title from H. W. through Alexander.

Defendant had notice of the lessor's title.

It was insisted that by the statute of this State, the legal title was in the vendees of Bean, as his deed was first recorded.

Charge to the Jury.

But the Chief Justice, in his charge to the Jury, gave it as his opinion, in which Judge Knight, the other judge present, agreed—that though Bean had taken advantage of the legal form required by statute, in first registering or recording his deed; yet as both B. and his vendees had notice of Ludlow's title, which was an equitable one, the whole is fraudulent as against Ludlow. That it would be mischievous to allow such fraudulent acts to prevail in a court of law, only to turn the parties over to a court of equity, where they would be immediately set aside.

A deed first recorded may be postponed by reason of its being fraudulently obtained. 1 Burr. 467. Worfley, et al. assignees of Slader vs. Demattos and Slader.

Ludlow vs. Gill.

Fraud, if fully proved, invalidates every transaction as well at law as in equity. Nor can a man validate a fraudulent act, by bringing it under the letter of a statute, any more than under the letter of a rule of the common law. Had there been a *bona fide* sale, in this case, to third persons, without notice, it might have had another consideration.

Fraud invalidatee at law, as well as in equity.

1. Burr., 397. Bright, executor of Crisp, vs. Eynon.

Fraud cannot be projected by a statute.

Accordingly the Jury found for the plaintiff.

September term, 1790.

CONANT

Conant vs. Bicknell.

vs.

BICKNELL.

Assumpsit for money had and received to the use of the plaintiff.

Plea, non-assumpsit.

It appeared in evidence, that the plaintiff, a sheriff's deputy, had an execution against Bicknell, in favor of one Woolston, a person residing abroad. The defendant counted out the money to satisfy the execution, on the table, being £3 18s. 8d., and shoved it across the table to Conant, who, thereupon, endorsed the execution satisfied. Upon which Bicknell immediately laid his hands on the money and turned it out as the property of Woolston, on an attachment at the suit of Bicknell against Woolston, and it was by another officer who was ready for the purpose, attached as the property of Woolston.

Money levied on an execution not attachable in the hands of an officer.

It was held by the Court, that money, collected by an officer on execution, cannot be attached out of his hands. On the receipt, the officer becomes a debtor to the plaintiff, not for the identical pieces of money, but for the sum.

Verdict for the plaintiff.

Orange County.

September term, 1790.

JOHN RICH

vs.

JOSEPH WAIT.

Rich vs. Wait.

This was an action of covenant broken, brought on a covenant of warranty in a deed of bargain, and sale of a tract of land in Maidstone.

On trial upon the general issue, no eviction appeared. The plaintiff still enjoys the land.

It was held by the Court, that an action will not lie on a covenant of warranty, until there has been an eviction, or some disturbance or hindrance in the enjoyment, which, in law, may be equivalent to an eviction.

To support an action on a covenant of warranty there must have been an eviction, or some disturbance tantamount.

Verdict for the defendant.

September term, 1790.

JONATHAN BATES, *ex dem.*

EDMUND SHATTUCK,

vs.

BENJAMIN TUCKER.

Shattuck vs. Tucker

Ejectment for land in Randolph.

The demise was laid the 6th Sept., 1786, to hold for the term of sixty years, from the 5th Sept., 1786. Ouster the 26th of May, 1787. This writ was dated the 25th of June, 1788.

On trial, the plaintiff proved a clear title in his lessor, on the 6th of September, the date of the lease.

Plaintiff's counsel.

On the part of the defendant, it was proved by a

Shattuck vs. Tucker.

copy from record, that, on the same day, the lessor sold the land in question to the said Jonathan Bates.

Defendant's counsel.

It was insisted by the defendant's counsel: 1. That the lessor having conveyed on the same day, on which the lease is supposed to be made; and, as the lease is a mere fiction, devised at the time of beginning the action, which, in this case, was long after the supposed date, or time of making the lease, the plaintiff has failed; for though the lease be a fiction, yet there must be a real subsisting title in the lessor of the plaintiff, at the (supposed) time of making the lease, and also at the time of bringing the action.

2. In this case, had there been an actual lease made on the 6th day of September, 1786, yet the lessor having conveyed to the lessee, on the same day, in fee, the lease was merged and gone; so that the plaintiff has not supported his title, in the way he has set it up.

The counsel for the plaintiff insisted that, as an ejectment is in form a fiction, designed to try the lessor's title; or rather, to put the real owner into possession; it is sufficient, if it can by any intendment, be made to answer this purpose. As the lease is laid to be made on the same day with the deed of conveyance, it is sufficient to intend, that the lease was prior, on the same day; and such intendment ought to be made in support of the plaintiff's right. As to the merger, that gives the plaintiff a real, instead of a fictitious title. No injustice will, therefore, be done, should he recover. He will be put into possession of his own.

Opinion of the Court.

In ejectment the lease, tho' a fiction, must, by possibility, be a subsisting lease.

But the Court held that the lease, though a fiction, must, by possibility be a subsisting lease, at the time of bringing the action; at the time of the supposed ouster, and at the supposed time of making the lease; the whole is under the control of the lessor, who is the real plaintiff. He is conusant of his own title—to that, he

must, at his peril, conform his declaration. He must set forth a lease, which might, by possibility, be a good subsisting lease, at the time of the supposed date, or making of the lease; at the time of the ouster, and at the time of bringing the action. Here there is a merger—the lease is united to and merged in the fee. There could not be a subsisting lease, either at the time of the supposed ouster, or at the time of bringing the action. If the principle contended for by the plaintiff's counsel should prevail, by carrying back the fiction, in point of time, recoveries might frequently be had, on titles long since extinguished or transferred. In this action the plaintiff is, and must be considered, as merely nominal, and all the right and benefit, as belonging to the lessor. If the lessor had no title to enable him to make the lessee, or, if he have departed with his title, though to the lessee himself, the action cannot be supported.

Shattuck vs. Tucker.

The lessor is the real plaintiff.

He must set forth a lease which might be good, etc.

Plaintiff is nominal; all the right and benefit belongs to the lessor.

The Jury found verdict for the defendant.

WINDHAM COUNTY.

Dec. adjourned term, 1790.

NORTON, *ex dem.*

A. DOUGLASS

vs.

Douglass vs. Spooner.

ELIAKIM SPOONER.

Ejectment for fifty acres of land in Westminster, on the original right of A. Douglass.

On trial a deed was produced from A. D., the lessor, to Norton, the plaintiff, dated in February, 1762, acknowledged and recorded June 9th, 1789.

In ejectment, the operation of the lease is not confessed.

In this case the Court held that the operation of the lease is not confessed. The proof must be according to the allegation. If the lease be made prior to the conveyance in fee, the lease is merged. If a man take a lease of his own land, the lease is void. The trespass laid is fiction, for which the defendant shall not be punished.

The connection between the lessor and the plaintiff, is supported by the fiction of a lease. If that fiction potentially cease, or a fact arise which destroys the possibility of such lease, or destroys its effect, if supposed once to have existed, there can be no recovery. The deed given in February, 1762, and recorded in June, 1787, becomes good from the date by retrospect. Even without recording, it is good against Douglass and his heirs. If a man have a title in fee, he should demand on that title, not on a lease.

Plaintiff cannot demand on a lease, and recover in fee.

A plaintiff demanding on bond shall not recover on note, or if he demand in his own right, he shall not recover in the right of an administrator. Douglass had

Douglass vs. Spooner.

departed with his right to Norton; Norton has declared on a lease, and proved a title in fee. He cannot recover in this action.

Verdict for the defendant.

N. B.—In January, 1791, Noah Smith, Esq., resigned, and Elijah Paine, Esq., was appointed Judge in his stead.

Chittenden County.

August term, 1791.

Pierson vs. Hovey, &c.,

MOSES PIERSON

vs.

HOVEY & HIBBARD.

On a prison bond.

This was an action on Sheriff's bond for liberty of the prison, and assigned to the plaintiff, the creditor,

Plea duress, and issue to the Jury.

Plea, duress of imprisonment and traverse.

Substance of the evidence.

The substance of the evidence was, that the plaintiff had recovered a judgment against Hovey, for 17s.; took out execution, and delivered it to Grant, constable of Charlotte, who took Hovey's cattle, posted and delivered them on receipt to W. and Strong, who left them in Hovey's custody. The cattle was not brought to the post, but were eloigned by Hovey. The plaintiff had the execution returned, without being satisfied, and took an *alias*, which he delivered to Rich, then constable of Charlotte. Rich made demand of Hovey, who refused to turn out any property, whereupon Rich took Hovey's body, and committed him to gaol in Rutland, according to the precept of the writ, on which this bond was given, etc.

It was insisted by the defendant's counsel, that this imprisonment was illegal. That property having been once taken in execution, that execution was, as to Hovey, discharged.

In this case, the Chief Justice gave the following in charge to the Jury:

The property was not, in fact, taken out of Hovey's custody, but was left in his hands (although receiv ted by third persons), and was by him eloigned. Had the

Pierson vs. Hovey, &c.

property in fact remained in the hands of the officer, it might have had a different consideration. Had the preperty proved insufficient, a second levy might have been made, either with the same execution or an alias. I do not apprehend, if an officer take property on an execution, which proves insufficient, or the property of another, he is precluded to levy on the body, or, by direction of the creditor, on land, for the remainder.

When property taken on execution proves insufficient, a second levy may be made.

The officer is not precluded by an insufficient levy.

"On a *Capias ad satisfaciendum*, in case an escape, or rescue, be returned, a new capias may be taken out," for, says the book, "an insufficient return of an execution is as none."

Bac. Abr.

The officer had taken the cattle, so far as to have a lien upon them, for satisfaction of the execution. On receipt, I do not consider that the officer wholly departs with that lien, and trusts to the receipt only. The property is delivered out of his actual custody, for the convenience of the defendant. The officer, is, therefore, less secure of the property; but his lien still continues. He may take it without the leave of the person receipting. As the property is out of the actual custody of the officer, to eloign it, would not, in strictness, be a rescue; but to some purposes, as in the present case, might have the same effect—to render the execution ineffectual.

Officer's right to property receipted on an execution.

To eloign property receipted is no rescue, but to some purposes has the same effect. It renders the execution ineffectual.

The Jury found a verdict for the plaintiffs, which was approved by the other Judges, Knight and Paine.

August term, 1791.

Addisen County.

Underhill vs Smith.

UNDERHILL, *ex dem.*

UNDERHILL

vs.

SMITH.

Ejectment for lands in Addisen.

The defendant's counsel conceded the title to be in the lessor of the plaintiff, unless the defendant had a good title. The defendant claimed under a deed from P., collector of a proprietor's tax in Addison. The tax was regularly voted. P. was appointed collector, and published a notification of the tax, January 1st, 1784, in Bennington paper only. The law requiring all such notifications to be published both in Bennington and Windsor papers, was passed in October, 1783. An advertisement was regularly published, notifying the sale to be on Monday, the first day of September, 1784.

Defendant derives his title from a proprietor's collector.

Advertisement published in but one newspaper.

The law requires it should be published in two, Bennington and Windsor.

In this case the Chief Justice observed to the Jury: A proprietor's collector acts solely by virtue of a power given by statute. He has merely a naked power to sell the lands of those proprietors, who are delinquent in the payment of the tax. He has no interest in the land. It is necessary, therefore, by the rules of law, that he should pursue his power strictly, however difficult. He must perform all pre-requisites, which stand as conditions precedent to his right of selling, such as giving all previous notices required, and in the precise manner required by law. Otherwise the

Charge to the Jury.

Collector has a naked power to sell, but no interest in the land.

Must pursue his power strictly and give all previous notice required by law

Otherwise his sales are void.

landowner cannot be considered as delinquent, and shall not forfeit his right. The legal consequence of a deviation by a collector, from the line of proceeding pointed out by statute, is to invalidate his sales, if made, and he shall be answerable to his vendee. Underhill vs. Smith.

The Jury found for the plaintiff, and approved by all the Judges.

Rutland County.

August term, 1791

RHODES

vs.

RISLEY.

Rhodes vs. Risley.

Action by an endorsee agst. the endorser of a note.

Action on the case for that on the 24th day of May, 1774, one J. Parker made his note to Risley, for the sum of £53 12s. 2d., payable in beef, pork, etc. That afterwards, to wit, on the same 24th day of May, 1774, the said Risley did, by his endorsement on the said note, order the said J. P., for value received, to pay to the plaintiff the said sum of £53 12s. 2d., etc., in due form.

The note, with the endorsement, was produced and read. Proved that Parker died insolvent about the year 1778.

Defendant's counsel offered to prove the purpose of the endorsement, which was in blank, and that the note was paid and taken up by one Grant executor or administrator of Parker, the original maker, and that Grant had sold it to J. G., who had sold it to the plaintiff, and the plaintiff had filled the endorsement to himself.

The defendant's counsel stated, and offered to prove that in the year 1781, the defendant employed one Pomroy to bring an action on the note, against one Grant, as executor, in his own wrong, on the estate of Parker; Grant having married Parker's widow, and taken the estate without administering; and that Risley's name was then put on the note for the purpose of filling a power of attorney. That a suit was commenced against Grant, who afterwards settled, paid Risley a certain sum, about £20, and took up the note. That Grant put off the note to J. G., and J. G. to the plaintiff, who filled up the endorsement to himself, and brought this action. And states that the defendant had never heard of the note since the year 1781, when Grant took it up.

Rhodes vs. Risley.

It was objected that if a note be endorsed blank, the endorser shall never be allowed to prove it was intended for some other purpose, and not to make him liable; especially when it comes into the hands of a third person. Agreeably to this have been the determinations in Connecticut—Kirby's Rep., 393, Hungerford vs. Thompson.

Plaintiff's Counsel in objection.

By the Court.—Kirby's reports are not to be cited as an authority here, nor are the determinations of Courts in other States; but you may cite their reasons.

Kirby's Reports no authority in this State, but reasons may be cited.

After a full hearing on the objection, the Court were of opinion, *dissentiente* Paine, to admit the evidence. The following argument is inserted from memory—no minutes were taken at the time; but it is the substance of what was said on the question.

Proof admitted.

Chief Justice—I have never been satisfied with those decisions which introduce an arbitrary custom, to bind a man contrary to his express agreement, and the real equity of the case. If, however, such customs have generally prevailed in a State, have been authorized by judicial decisions, and property be involved in its continuance; it ought not rashly to be shaken. In this State, I apprehend, such custom as is here contended for, has not generally prevailed. There have been no leading decisions in the Courts of law on the point. The matter, therefore, lies open to investigation.

Argument of the Chief Justice on the question.

No custom has prevailed in this State which can effect the question.

It is said, if a man sign his name blank on a note, which he transfers, the endorsee may fill it up with a power, or a general endorsement, for value received; and from the nature of the transaction, the endorser shall be bound, and that he shall never controvert the right, notwithstanding any agreement made at the time of the transfer. We lay aside custom, and go on the

Rhodes vs. Risley.

How far an endorser is responsible.

Endorsee can not demand contrary to his agreement, at the time of endorsement.

Endorsement prima facie evidence, but may be controverted

If the endorsee make use of the endorsement, contrary to his agreement, he is answerable in damages.

Moses v. Macpherlan. 2 Burr 1006, & 1 Black. 219 S. C.

Inconsistency of that determination.

footing of common justice between the parties. A. sells a note to B., and to enable B. to recover of the maker, endorses his name blank on the note. At the same time it is fairly agreed, that B. shall risk the ability of the maker of the note, and shall, on his failure, have no demand on A. In this case A. is, in common justice and honesty, under no obligation to B. on failure of the maker. Nay, B. cannot, with a good conscience, demand anything of A. The endorsement, though filled up by the endorsee, may be *prima facie* evidence of an obligation on the endorser; but it is only *prima facie* evidence, and, in justice, should be allowed to be controverted. What ought to be decisive in this case, is, that if the endorsee make use of the endorsement contrary to agreement, to the damage of the endorser, he is answerable in damages. This has been clearly decided in Great Britain, where the negotiation of notes is carried to its greatest length. This was the great point decided in the case of Moses vs. Macpherlan. Moses endorsed four notes to Macpherlan, under a special agreement, that Macpherlan should indemnify him against all the consequences of such endorsement. (Note—This agreement was in a seperate memorandum.) Macpherlan brought his actions, on the several endorsements against Moses, at an inferior Court. The Court refused to hear evidence of the agreement, and gave judgment against Moses, who, thereupon, brought his action against Macpherlan, to recover back the money so unjustly recovered. And it was solemnly determined, that an action well lay. This is to say, the endorser in such case is holden, and he is not holden. The evidence, which could not be admitted, to save him from an unjust payment, could be admitted, and thought amply sufficient, in another action, to recover back the identical money.

However, it was observed by Lord Mansfield, in that

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action, that the inferior Court, did right in not going into the collateral agreement, otherwise they might have gone into matters which exceeded their jurisdiction. This reason seems to imply that a superior Court might, and would have gone into the whole matter.

Principles of the common law, what?

Let us now consider the nature of the transaction, as it stands, between the original endorser and the subsequent endorsees. And, in considering this point, I shall not feel myself bound by foreign precedents, but by the principles of the common law, which are the principles of common justice, as they apply to the general circumstances and situation of this Commonwealth. In Great Britain, they consider the endorsee as giving credit, as much to every prior, as to his immediate endorser. This, it is said, is established by the course of trade, and is for the benefit of commerce. This is, at least, problematical. But as this State is not, and from local situation, cannot be greatly commercial, this may be laid out of the question. The case then will stand thus: A. sells a note to B., at the risk of the purchaser, and endorses it blank. In this case it is unconscionable in B., on failure of the maker of the note, to demand the money of A. But B. has sold the same note, still endorsed blank to C. The question is, whether B. can give a greater right than he had himself. A's. name is on the note—this may prove that B., the possesser, has a right to use, or sell, and nothing more, independent of the custom. C. contracts with B., to B. he ought to look for the right, which he purchases, whether it be a right against the maker only, or whether A. is to warrant, in case the maker shall fail. If B. deceive C., he alone shall be answerable. The fraud of B. ought not to injure A. Let each trust where he contracts. *Caveat emptor*—

C. takes a note of B., endorsed blank by A. He must trust to B. for the right he may have agst. A., on failure of the maker.

Rhodes vs. Risley.

"Beware, purchaser!" may, with great justice, be applied in this case. The same hard, technical reasoning has prevailed, in some laws, against the makers of a negotiable note in the hands of an endorsee, where a payment, not minuted on the note, has been made before the transfer. But, in some of the neighboring States, the same principles of common justice, which I now go upon, have prevailed, in this point. The Courts have made it a rule to allow all payments *bona fide* made before the transfer, or rather, before notice; and the endorsee must look to the endorser for so much. This differs only in name, the reasons go the whole length of the present case. The evidence ought to be admitted.

As to the other point, of a long time having elapsed without notice given to the endorser, it is on the part of the plaintiff to prove due diligence, and reasonable notice of failure. It is not in the present question.

The evidence was admitted, and the Jury found a verdict for the defendant.

WINDHAM COUNTY.

September term, 1790.

ROBERT WIER
vs.
T. CHURCH.

Wier vs. Church.

Indebitatus assumpsit for £45 13s. 3d., money had and received, etc.

Plea, non-assumpsit.

Evidence.

The substance of the evidence to the Jury was, that on the — day of ———, 1787, N. Smith had an execution against R. Wier, in the hands of an officer. The defendant, as agent for Smith, proposed to Wier, that the execution should rest, without expressly saying for how long; and that Wier should see Smith, for a settlement, on a certain day, which was agreed between them. And to secure all damages which might happen by the delay, Wier delivered to Church a note, signed by one Aylesworth, endorsed by one Watkins, and by Wier. At the same time, Wier declared if he did not go and make a settlement at the time, the whole should be forfeited. Church directed the officer immediately to go and serve the execution on Wier's land, and to keep it secret until he knew whether Wier made the settlement, which was done by the officer. Wier did not go, or make a settlement with Smith at the day, alledging that Church had broken the agreement. Wier's land was then set off to Smith, to satisfy the same execution. Church sold the note to Shattuck, who brought an action against Wier, as endorser, and Wier paid the note, to the amount of

Wier vs. Church.

£45 13s. 3d. It was proved that Wier said, the note was good for nothing, and that Church said, he knew Wier ought to have something, but he had made a jocky trade with Shattuck, and took some lands, which were, perhaps, of no value; and Shattuck would not join in a settlement.

Court.

If from the nature of the transaction, forbearance to do a certain act on the one part, which, though not expressly mentioned, was in the meaning and contemplation of the parties, be necessary to render a performance of any avail, or even possible on the other part, it must be taken as a condition precedent.

The Court observed to the Jury, that, though, it were not expressly mentioned, yet, if they found it was the meaning of the parties, and followed from the nature of the transaction, that the execution against Wier should be stayed, that he might have an opportunity of settling with Smith, it must be considered as a condition precedent; for if the execution went on, there was no opportunity for a settlement, and Wier would not forfeit, though he did not attempt it; consequently Church could have no right to retain the note. Trover would have lain against Church, immediately, on refusal to deliver it to Wier, while it remained in his own hands. As he has sold it, Wier has a right to wave the tort, and go for the value of the note as sold.

Where Trover would lie, if defendant have sold the property, plaintiff may wave the tort and go for the value.

Verdict for the plaintiff.

WINDSOR COUNTY.

September term, 1781.

JACOB, *ex dem.*
PAINE & MORRIS
vs.
JOEL SMEAD.

Paine, &c. vs. Smead.

Ejectment for lands in Windsor,

General Issue—Not Guilty.

On trial, the plaintiff gave in evidence an office-copy of a charter, under New Hampshire, of the township of Windsor, in which Simeon Chamberlain was a grantee—a deed from Chamberlain to J. Willard, dated the 16th of July, 1761; from Willard to Israel Curtis, 3d October, 1767; from Curtis to William Smead, 1st May, 1770; a power of attorney, Dec. 30, 1771, from William Smead and others, proprietors under the New Hampshire grant, to N. Stone, for the purpose of authorising him to procure from the Governor of New York, a confirmation of their claims in Windsor, either in their names, in the name of Stone, or in the name of any other person or persons, as he should think proper.

Plaintiff's evidence.

The New York charter, reciting, that the New Hampshire charter was surrendered, etc., was dated the 28th March, 1772, to N. Stone, and twenty-one other persons. A release from the other grantees to Stone, dated the 31st of March, 1772; a deed from Stone to Henry Cruger, April, 1772, of 3000 acres of land in Windsor, which was sold by agreement of the New Hampshire proprietors to defray the expenses of the New York

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grant. The will of Henry Cruger, who is since dead, dated June 11th, 1779, signed, sealed and attested by three witnesses, in which, among other things, there is a devise to his executors, N. Watson, —— Van Shaack, and —— Cruger; to sell all, or any part of his lands in America (he died in England) in fee. This will has been proved in England, and was recorded in Windsor, November 7th, 1787.

It was objected by the defendant's counsel, that Cruger's will has never been probated in any proper office in this State. But, by the Court, it is not necessary to the conveyance; it is sufficient to prove the execution of the will.

A will need not, for the purpose of passing lands be probated.

A deed from two of the executors to the lessors of the plaintiff, dated 23d of April 1787, acknowledged and recorded.

The land demanded is 100 acres, parcel of the 3000.

A receipt from W. Smead to N. Stone, for a deed given to himself and a third person, of his, W. Smead's, proportion of land in Windsor, under the New York grant.

Objection by the defendant's counsel, that the receipt was not proper evidence to prove a conveyance.

Court.—It is not designed to prove a conveyance from W. Smead. Grantees under a former charter might surrender to the King, without deed, and may be bound by acceptance of, and acquiescence under a second grant, without deed. The receipt may be evidence of such acceptance and acquiescence.

Acceptance and acquiescence under a second grant may be provided without deed.

Several witnesses proved that there was a general acceptance and acquiescence in the New York grant, and by W. Smead in particular. It did not appear that W. Smead, who is since dead, did, in his lifetime, make claim to the lot in question, which was divided to the Chamberlain right, under New Hampshire. The

Proof that the N. H. proprietors generally accepted.

Proof that W. S. accepted in particular.

defendant claims as heir to W. Smead, and has taken possession since his death.

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It was conceded that the defendant is son and heir to W. Smead.

Defendant is heir to W. Smead.

No evidence was produced on the part of the defendant.

Charge to the Jury.

In the charge to the Jury, the Chief Justice made, among others, the following observations, to which Judge Knight, the other Judge in Court, fully agreed.

The right now in question, as far as relates to the operation of the charters, must be determined agreeably to the law, then in force, which was the common law of England. The Governor of New Hampshire, while this territory was under that jurisdiction, and, after the transfer to New York, the Governor of that province had a power to grant such lands as were then in the right of the King. These grants were not made in the personal, or even jurisdictional right of the Governors, but by royal authority, given for that purpose; and they are to be considered, in their construction and operation as royal grants. The King was, in view of the law, the ultimate owner of all lands within his dominions, and had the reversion in himself. An estate in fee, the highest right which a subject could have to lands, was said to be derived out of the King's right, and to be subordinate to that right. Agreeably to this doctrine, a surrender might be made to the King, of a former grant. On a surrender, the King was in of his former right, and might grant again as he pleased.

Decision in this case ought to be agreeably to the law in force at the time —which was the common law of England.

Power of the Governors to grant.

The grants were made by authority from the crown, and are to be considered as royal grants.

The King the ultimate owner of the land.

All private right derived from, and subordinate to his right.

Surrender might be made.

The plaintiff in this case relies that the New Hampshire charter of the town of Windsor, was surrendered into the hands of the Governor of New York, for the crown; and, that the letters patent issued, in consequence, by that Governor, acting for the Crown, and

Plaintiff relies on a surrender of the New Hampshire charter.

And that the New York grant operates as a confirmation.

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intended to operate by way of confirmation to the claimants under the former grants, were good and valid. The act, itself, by which the surrender was made, is not produced. The proof of the surrender of the New Hampshire grant, arises from the power given to Stone, the agent. From the recital contained in the letters patent of New York, which, we think, is good ground of presumption, and, indeed, *prima facie* evidence of a surrender; ——— and from the acceptance and long acquiescence of the NewHampshire proprietors under this grant, it should seem that the acceptance and acquiescence alone, which must have involved almost the whole property of the land in the town, would be construed a waver of the former grant, and a confirmation of the latter. It may be further observed, the original charter of New Hampshire has not been produced; and it is agreed that it was lodged in the office of the Secretary of the Province of New York, previous to issuing these letters patent, and that it remained in that office.

Recital of a surrender in the second grant, prima facie evidence.

Long acquiescence under the second, a waver of the first.

Presumption from the N H. charter not being produc.d.

The defendant in this action stands in the place of his father, William Smead; and his claim must be viewed in the same light. W. Smead, who claimed the premises under the grant of New Hampshire, was a proprietor of several rights or shares, and was one of those who executed the power to Stone to procure a confirmation from the Governor of New York. It is in evidence that W. Smead accepted from Stone a title of lands in Windsor, to himself and vendees, in full for his claim under the former grants, in part, of the same lands which he formerly claimed, and in part of other land, the benefit of which he enjoyed and left to his heirs; for it will be observed, that under the New York grant, the whole property was vested in Stone, in trust, that he might convey to every one, ac-

Defendant stands in place of W. Smead.

W. Smead executed a power to Stone, and took from him a deed of land, &c.

Paine, &c. vs. Smead.

cording to his right; and that the division which was made under the New Hampshire title, was not then taken to have any legal efficacy, but served only for description. Had the question arisen between a New York claimant, and a claimant under New Hampshire, who had disagreed to these proceedings, and refused any benefit under the second grant, it might have had another consideration; at least, it would have stood in a more favorable light. The Governor of New York, and the authority of that Province were guilty of the highest oppression and injustice toward the New Hampshire grantees. They held the titles derived through the Governor of New Hampshire to be void. They were able to enforce this opinion by violent laws, and by the arbitrary decisions of their Courts. In consequence of these measures, they extorted large sums of money from the New Hampshire grantees and settlers, for what they called a confirmation. This was practised upon the proprietors of Windsor. It is insisted that the injustice of this demand ought to invalidate the New York grant. It is wholly a new doctrine, that the greatness, or, if you will, the enormity of the consideration given, should invalidate a grant. If it be not a legal reason, it is certainly a favorable argument for the grantees, in support of their grant.

It would have been more favorable for a proprietor who had dissented.

The enormity of the consideration given cannot invalidate the grant.

Verdict for the Plaintiff.

[END OF THE REPORTS.]

PART II.

DISSERTATIONS

ON THE STATUTE ADOPTING THE

COMMON LAW OF ENGLAND,

THE

STATUTE OF CONVEYANCES,

THE

STATUTE OF OFFSETS,

AND ON THE

NEGOTIABILITY OF NOTES.

PREFACE TO THE DISSERTATIONS.

I HAVE not the vanity to suppose that the opinions contained in the following Dissertations, are to be considered as precedents; they are only private opinions upon points of very considerable importance in the administration of law and justice, in this State. It has been my aim to derive these opinions from principles, which coincide with the principles of our Government, and the spirit of its laws; and to support them by reason, rather than by precedents.

A knowledge of the principles in which precedents are founded, and the true reason of their application, is of much greater importance in the profession of the law, than the knowledge of precedents only. The latter may serve to form the mere technical laywer; the first leads to the fountains of justice, the existing relations of nature in society, and connects the principles of law with the true principles of morality.

It is believed that the principles and reasons, an illustration of which is here attempted, have, if well founded, often occurred to gentlemen of the profession. To such, these Dissertations may be less useful. But, I flatter myself, that they may be, in some measure, useful to students, by exciting them to the due use of their reasoning powers, as well as the power of memory, and by furnishing them with some hints for a proper estimate of precedents—their principles and application.

RUTLAND, September 3, 1792.

A Dissertation

On the Act Adopting the Common and Statute Laws of England.

The reasons for passing this act are contained in the following preamble;

Preamble.

"Whereas it is impossible, at once, to provide particular statutes, applicable to all cases wherein law "may be necessary for the happy government of this "people. And, whereas, the inhabitants of this State "have been habituated to conform their manners to "the English laws, and hold their real estates by English tenures."

1st Section adopting the common law of England.

By the first section it is enacted: "That so much of "the common law of England, as is not repugnant to "the Constitution, or to any act of the Legislature of "this State, be, and is hereby adopted, and shall be, "and continue to be, law within this State."

What is understood by the common law of England.

By the common law of England, exclusive of positive laws enacted by statute, are understood those rules and maxims by which decisions are made in their courts of law, whether in relation to the mode of prosecuting a right, or to the right itself. Rules and maxims which have been there adopted, "time, where-"of the memory of man runneth not to the contrary." For a knowledge of the common law of England, we must have recourse to the history of their law proceedings, handed down in almost innumerable volumes of reports, and to the writings of the sages of their law.

Learnt from law reports.

Hence are drawn maxims and precedents for the decision of all causes, at common law.

Adopted under restrictions.

The aforegoing statute, adopting the common law of England, in this State, has rendered a knowledge of that law indispensible in our Courts. This statute expressly limits the adoption of the common law to so much as is not repugnant to the Constitution, or any act of the Legislature of this State. By this limitation,

Cases in which it is excluded.

all that part of the common law which relates to the royal person, family, and prerogative; all which relates to the peerage, their privileges and pre-eminence, is excluded. We have, strictly speaking, no common

We have no common law officers.

law officers. All the offices in this State are etablished, and the duties, in general terms pointed out by the

They are all by constitution or statute.

constitution or by statute. The terms and expressions adopted in both, are frequently derived from the common law. The office of Sheriff, for instance, is contemplated in the constitution, and established by statute. His power and duties are pointed out, generally, by statute; these are, mostly, the same as those of a sheriff in England. Yet these powers and duties are derived from the constitution and statutes of this State, and limited by them. The manner in which these

Their duties may sometimes be learnt from the common law.

shall be exercised, if not pointed out by our laws, must be learned from the common law of England, so far as adopted here; as, the manner of an arrest—what shall be deemed an escape.

Rules of practice in few instances admitted.

From the different constitution of our courts, the English mode of practice can, in very few instances, be

English rules applicable in pleadings, in torts, frauds & contracts.

adopted; but their rules may, in most instances, be applied in determinations on pleas and pleadings; in the construction of words and of laws; in almost every instance, which can arise, in our state of society, between individuals, on torts, frauds or contracts.

It will be much more restricted in cases arising on

our landed titles. Many of those titles were derived from the King of Great Britain, and many conveyances made, while under British laws and government. Their validity and operation must be decided by the laws, under which they were derived and made. But our landed property has suffered a great alteration by the revolution. It has been changed in the hands of owners, from estates in fee, into allodial estates, holden no longer, even in idea, of a superior.

Less in titles of land, except where derived under those laws.

Titles changed from fee to allodial.

The mode of descent, and right of inheritance, depend entirely on our statutes; while the degrees of affinity and consanguinity are to be learned from the common laws of England. The whole chapter of entails is abridged—perhaps, expunged—in a word, all the consequences of the feudal tenure are abolished—a tenure once very general in Great Britain, the traces of which are still visible in all their laws relative to landed property, and which introduced rules and maxims full of absurdity and oppression. Rules and maxims, which, there, still operate more or less, although the reason of their introduction has long ceased. That part of the common law which arose from the adoption of the cannon law, has shared the same fate.

Mode of descent, affinity, &c.

Entails, and every consequence of the feudal tenure abolished.

I have given these instances by way of example only. It is not my design to enumerate every instance in which the common law of England is to be applied in this State, or in which it is excluded or restricted. It will be of more use to discover some general principles which may enable us to distinguish properly in our applications.

The common law of England is a system of rules, supported by precedents, handed down from remote antiquity. These precedents have, by the body of the law, as is common enough with professional men, been held in too great veneration. A number of precedents,

Common law a system of rules, etc.

Precedents have been too highly esteemed.

Disadvantages under which many precedents have been formed.

in point, however obscure or uncertain the principles upon which they were founded have been held, fully decisive of a similar question; and yet many of these precedents were made at a time when the state of society, and of property were very different from what they are at present; in an age when the minds of men were fettered in forms; when forms were held to be substances, and abstractions real entities. Technical reasoning and unmeaning maxims, of course, frequently supplied the place of principles.*

Alterations in Society.

Society was in a state of melioration. Manners and sentiments progressed towards refinement. Intercourse between individuals, as well as nations, began to be extend, and in some measure, secured the rights of property, and the rights of commerce were investigated and better understood. The clouds which had long hung over the reasoning faculties, began to be dispersed; principles were examined and better established. † *Cessante ratione, cessat et ipsa lex* was adopted as a maxim of the common law; for, in those times, nothing could be decided or altered without a precedent or a maxim. By the application of this maxim, some precedents, which were originally absurd, and some, which had become inapplicable through a change of times and circumstances, were set aside. The progress, however, was slow. Men correct, or give up with reluctance, those things which have cost

Some precedents which were become absurd, set asider

Difficulties intervening.

* *Solvatur eo ligamine, quo ligatur,*" literally, "Let it be loosened by the same tie by which it is bound This pompous, unmeaning maxim was introduced from the civil law. Tying and untying, binding and loosing, are different operations, connected only by the subject, and may be performed by different means and different powers. There is no kind of similitude between them. By a forced application of this unmeaning maxim, many an obligor has been condemned to a second discharge of his obligation, although able to make indubitable proof of a former discharge, differing from his contract only, in some immaterial circumstance. to the full acceptance of the obligee; and this, because he could not make his proof by an instrument of the same kind with that by which he was bound. Lord Kaims has, somewhere, nearly the same observations.

Let me here add an instance of a different kind The whale was a royal fish The head was alloted to the king; the tail to the queen *Lex est summa ratio*—Law is the perfection of reason A reason must be given for this allotment Say the ancient lawyers. with much gravity: "The tail was given to the queen to furnish her wardrobe with whale bone;" but for this, as whale bone is found only in the mouth of that fish, she must have been still beholden to the king.

† When the reason of a law ceases, the law itself ceases.

them much pains in learning. Many such precedents had, however, become a rule of property. These could not be shaken by the Judges, without the greatest injustice to individuals. They must, therefore, wait a legislative remedy.

Upon rules and precedents, Judge Blackstone has the following observations: "Not that the particular reason of every rule in the law can, at this distance of time, be always precisely assigned; but it is sufficient that there is nothing in the rule, flatly contradictory to reason, and then the law presumes it well founded." And again, "Precedents are to be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose they acted wholly without consideration." This might, perhaps, be well enough in England. But the principal reasons there for so strict an observance of precedents, are that the rules of law may, from their permanent uniformity, be the better known; and lest by too easy a departure, Judges might unwarily disturb rights or property acquired, transmitted, or holden on the faith of such precedents. If no reason can be assigned, in support of rules or precedents, not already adopted in practice, to adopt such rules is certainly contrary to the principles of our government and the spirit of our laws, which admit not of arbitrary rules, or of arbitrary decisions, even in matters indifferent.

Blackstone's Com., I., 70.

Precedents to be followed, unless flatly absurd, from a deference to former times.

This seems not a good reason.

True reason in that kingdom

With us, no rule ought to be adopted, unless a good reason can be given for the rule itself.

We can readily suppose that former ages did not act without consideration; we can believe them to have acted upon principles and reasons, which arose out of their state of society; but it would be too great a deference to concede to them, who are now no way interested in the concession, or affected by it, the principles and reasons which arise out of the present state.

We ought not to yield to former ages the principles and reasons of the present.

It is much more just to them, and to ourselves, to suppose that good reasons there existed, which, from a change of circumstances, have long since ceased.*

A particular rule of the common law. in what deficient.

It was a rule, that if a statute be made, altering the common law, and a statute come after, repealing the former statute, the common law revives. But it ought to be understood with this limitation, if the common law be founded on principles still existing in the present courts of justice.

Legal right & wrong, have relation to the principles of the government

Legal right and wrong, particularly in criminal jurisprudence, have an intimate relation to the constitution, principles and circumstances of the government. There will be a coincidence between the principles of the government, the spirit of its criminal law, and the mode of interpretation and execution.

British government consists of a monarchy, &c.

The British Government, which has ever been a mixture of monarchy, aristocracy and democracy, has

Their laws influenced by the monarchical principles.

principles peculiar to that government. The monarchical principles have a silent, but uniform influence on their criminal jurisprudence.†

At the time when the common law was growing into a system, by means of precedents, the Judges were

*Determination of law, though they cannot always go the full extent, ought never to stand opposed to the nicest sense of moral obligation, to the principles of the government, or to what ought to be the spirit of its laws In adjusting these, we should act more wisely if, instead of entertaining a blind veneration for ancient rules, maxims, and precedents, we could learn to distinguish between those which are founded on the principles of human nature in society, which are permanent and universal, and those which are dictated by the circumstances, policy, manners, morals and religion of the age.

† Many instances might be given of the influence of feudal, monarchical and aristocratical principles on the decisions of the English law. The following are selected as examples.

Homicide per infortunium; or the killing of a man by misadventure, is held to be a crime. The manslayer is, indeed, pardoned of course; but he forfeits his goods to the king, because, says the law, the king has lost a subject. This is evidently of feudal original. The forfeiture was at first intended as a reparation to the king for the loss of a vassal.

The absurd doctrine of deodands, which still disgraces the English laws, was derived from the superstition of the times; but is now considered as a prerogative right.

By attainder, the blood of the person attainted is supposed to be corrupted, and to have lost every inheritable quality. The king may pardon the person attainted, and make him a new man, but cannot restore his former inheritable connections, or prevent an escheat to the Lord. A son, born before the attainder, shall never inherit to this new man; his after acquisitions shall rather escheat. An after-born son may inherit; but not if there be any former son living, or heir of such son.

The following rule, which was adopted in a matter of mere civil right, is of the same feudal origin:

The brother of the half blood shall never inherit to the brother of the whole blood. The fee shall rather escheat to the Lord, because by the feudal constitution, the decent is confined to the whole blood of the first feudatory.

solely dependent on the Crown. Monarchy procures obedience no less by fear, than by the principle of honor. The higher orders in the government, and the most aspiring characters are influenced by the prospect of attaining honors. The multitude are restrained by fear. The manners of the people were rough, and little short of savage. From all these circumstances, their punishments became, in many instances, shockingly severe. Whether it be owing to the force of habit, to the influence of the monarchical and aristocratical principles in their government, or both, modern refinement of manners, modern delicacy of sentiment has prevailed very little to soften that severity. Their laws, like those of Draco, may emphatically be said to be WRITTEN IN BLOOD. They have about one hundred and sixty capital offences. These are mostly created or confirmed by statute; but some are still crimes at common law only.

Former dependence of judges.

Fear, as well as honor, influence in a monarchy.

Roughness of ancient manners.

All these have introduced an excessive severity, which still exists in their laws.

Blackstone's Com., iv., 18.

The government of this State is that of a democratic republic. The principle of this government, by some called virtue, is a sentiment of attachment to its constitution and laws. This principle dictates moderation in the enacting, in the interpretation and execution of its laws. Here there is, perhaps, some danger, lest, through the influence of precedents, the Courts should deviate from the spirit of moderation, the true spirit of our laws. I should lay it down as an unalterable rule, that no Court, in this State, ought ever to pronounce sentence of death upon the authority of a common law precedent, without the express authority of a statute. "All fines," says the constitution, "shall be proportioned to the offences." This is not to be understood of pecuniary mulcets only. The word *fines* is here to be taken as synonymous to punishments. Taken in this large sense, the clause is consonant to the principles and spirit of our government and laws.

The government of Vermont wholly democratic.

Dictates moderation.

Common law precedents cannot justify a capital punishment.

Fines shall be moderate.

An act which is criminal in England, may not be so in Vermont.

Actions, which are criminal in England, may not be so in Vermont. Civil crimes become such by a certain relation to the society where they are committed. From the difference of the relation in different societies, the same action may be either not criminal at all, or criminal in a different degree. Here, *cessante ratione, cessat et ipsa lex*, ought to be applied, whether to determine an action not to be criminal, or to be criminal in a less degree. Nay, the principles of the common law, which are the true principles of right, so far as discoverable, are competent to decide on the criminality of an action, which shall be notoriously and flagrantly injurious to society in this State; although such an action had never been done, or even heard of in England, and to declare a punishment, but short of death.

The principles of the common law are competent to determine an act to be a crime, and to punish; but short of death.

Lord Mansfield as a Judge.

Lord Mansfield was powerfully attached to the monarchical and aristocratical principles of the British government. Whenever these intervened, in a cause, they had great influence on his reasonings. In other questions merely of a civil nature, he was a great and a good Judge. No Judge, perhaps, in that country, ever had a more thorough knowledge, both of the principles and precedents of the common law. His judicial opinion may be considered as a common law precedent, in the construction of this statute. "The law of England," says he, "would be an absurd science indeed, were it decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty, but the law of England, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases, according as they fall in with the one, or the other of them."

His opinion of the common law.

Cowp. 37 Jones vs. Randall, et al.

We may then lay it down, that this statute gives the

citizens of this State the rules, maxims and precedents of the common law, so far as they serve to illustrate principles—principles only, which, from the situation of society with us, exist in this State, but does not impose upon them those principles, which, from the particular circumstances of that government, exists only in England.

This statute adopt those principles of the common law, which are applicable, etc, rather than the precedents.

The act goes on to recite that, "Whereas the statute law of England is so connected and interwoven with the common law that our jurisprudence would be incomplete without it; therefore it is enacted, that such statute laws, and parts of laws, of the kingdom of England and Great Britain, as were passed before the 1st day of October, A. D. 1760, for the explanation of the common law, and which are not repugnant to the constitution, or some act of the Legislature, and are applicable to the circumstances of the State, are hereby adopted and MADE, and shall be, and continue to be, law within this State, and all Courts are to take notice thereof, and govern themselves accordingly."

2d sect. Recital.

Adopting statute, &c.

In this section the words, "and are applicable to the "circumstances of the State," render any comment unnecessary. Indeed, though these words are not expressed in the former section, *tamen tacite infunt*, they are contained in sense.

Restriction in this section.

A DISSERTATION

ON THE

STATUTE OF CONVEYANCES.

"AN ACT for authenticating and registering Deeds and Conveyances.

"For preventing fraudulent sales, and incumbrances "of real estates, and to the intent it may be better Preamble. "known what title or interest persons have in, or to "such estate as they shall offer to sale."

1st Section. "*Be it enacted, etc.*, That all deeds and conveyances of any houses or lands within this State, signed, sealed and delivered by the parties granting the same, having good and lawful authority, attested by two or more witnesses, and acknowledged by such grantor or grantors, before a Justice of Peace, and recorded at length in the Town Clerk's records, where such houses or lands do lie, shall be valid to pass the same, without any other act or ceremony in the law, whatsoever; want of livery of sezin, or atornment of possessors, notwithstanding."

Intention is expressed in the preamble, to give a notoriety to conveyances &c.

The intention of the Legislature in passing this act, is fully expressed in the preamble; and it will be necessary, in the construction, to have an eye constantly upon this intention. The intention is generally to give a notoriety to all rights, titles, and legal claims, to or upon any real property within this State.

1st. For the benefit of creditors.

1st. For the benefit and security of creditors, to whose demands the lands of debtors, held in their own right, are, by another act, made liable.

2d. For the benefit of purchasers.

2ndly. For the information of purchasers, that every one, who proposes to purchase any land, may know where to find evidence of his vendor's title, and of all incumbrances in any way affecting the same.

Species of conveyance.

For attaining these ends, it is enacted, that all deeds or conveyances, etc. Although this statute points out no particular species of conveyance, yet it is evident that the Legislature had principally in view that species which is most common in this State—by deed poll, and is called a bargain and sale; in which the tenements described in the premises are expressed to be bargained, sold, conveyed, etc., by the bargainor to the bargainee, and is executed by the bargainor only; for the execution of the bargainor only is mentioned; but any species of conveyance which contains words operative at common law to convey*, will be equally valid; pro-

Deeds of bargain and sale principally in view.

* The deed of bargain and sale is generally considered, by the English law writers, as derived from the statute of 27th of Henry VIII, chap. 10, called the Statute of Uses, and as executed by force of that statute. But it was, in fact, a common law conveyance, and had its operation at common law; or, at least, upon common law principles, and not by force of the statute of uses. The words of that statute are: "That where any person stands, or is seized of, or in any honors, etc., lands, tenements, etc., to the use, confidence, or trust of any other person or persons, etc. Such person or persons, etc., that shall have any such use, shall be deemed and adjudged in lawful seizin, etc., and the estate, right, and possession, etc., shall be deemed or adjudged in him or them, which have the use, etc."

Where one stood seized to the use of a third person, this statute executed the use in the third person, or rather gave him the legal estate; but it does not extend to one, who stands seized to his own use. It is probable that those who introduced the clause in this conveyance, which expresses it to be to the use of the bargainee, had an eye to the statute of uses; but that will not extend the operation of the statute to a case not within it. Some writers (vide Black., Com. ii., p. 338) have supported the bargainor, by implication, to stand seized to the use of the bargainee, and that then the statute executes the use. But there is no room for such implication. The words of the conveyance, generally, express a direct transfer from the bargainor, and a departure, not only with all his right in the premises, but with the whole premises, to the bargainee. The truth is, that this circuitous mode of reasoning was introduced by the circuitous modes of transfer, which had been invented to get over the ancient feudal restraints upon alienation, and to secure landed property against the perpetual danger of escheats and forfeitures, to which it was liable. The judges and sages of the law, habituated to pursue the rights of real property through a thousand intricate ambages and circuitous labyrinths, invented for the purpose of evasion, had almost lost the idea of a simple right, or a direct mode of transfering such right. When the feudal restraints were taken off, and the right of the tenant better secured, they found it difficult to lay aside their technical reasonings. That the property should pass, by a direct transfer from the bargainor to the bargainee, as expressed in this conveyance, appeared to them too simple for a transaction of such importance. They, therefore, forced an implication, that the bargainor was, by virtue of the bargain and sale, seized of the lands meant to be conveyed to the use of the bargainee, and then the statute, as they expressed it, executed the use, or in plain English, the property passed to the purchaser.—*Vide note to Coke, Litt.* 275, 14*th edit.*

vided that each and every of the parties, from whom anything passes by the grant, comply with the requisitions of the statute.

But the statute extends to all common law conveyances.

I said, at common law, for none of the statutes of Great Britain, as such, have any force in this State. The rules of the common law, which, with us, apply to the transfer, or to the rights of real property, are few and simple. They are those only which apply to allodial rights. All landed property in this State is, by the constitution and laws, truly allodial, that is, absolute in the owner. He does not hold, even in idea, of a superior.

Statutes of Gt. Britain, as such have no force in the State of Vermont.

Rules of common law, which apply in the titles of land are few.

"Signed, sealed and delivered by the parties granting the same." The party or parties conveying, are to sign their names to the instrument, with their own hands, or make their marks, if they cannot write, which will be a sufficient signing within the meaning of the statute. Sealing, since the art of writing has become generally known, the disuse of arms and particular impressions, is nothing more than a mere ceremony; but the common law made it essential, and the statute has made it equally necessary with signing, in instruments of conveyance.

Signing.

Sealing.

The seal may be of anything which will adhere firmly; but it is not deemed necessary to put a particular, or, indeed, any impression upon the seal.

The deed must be delivered, that is, given into the hands or possession of the grantee, or of some other person, for the grantee's use; but no set form of words is necessary in the delivery.

Delivery

"By the parties granting the same, having good and lawful authority." Of this word, *authority*:

Authority to grant.

1st. It restrains the right passing, to such right as the grantor had in the the thing granted. It is here thus guarded, not without reason; for by the common law of England, a feoffment frequently gave a right

Restrained to the right of the grantor.

greater than that of the feoffer; and operated to discontinue the estate, or take away the entry of third persons.

An exception of persons incapable.

2ndly. It operates as an exception to conveyances made by persons, who, in law, are considered as incapable of contracting, or who, by reason of their situation, are allowed to avoid their contracts.

Infants.

Such are infants, whose acts are voidable, when they come to full age.

Femes covert.

The acts of femes covert, and idiots are absolutely void.

Lunatics.

The acts of lunatics were, by the English law, voidable, by their heirs, but not by themselves, even after they recovered their reason.

This absurd doctrine arose from a mere sophistical quibble.

"A person could not plead, that was insane, when "he did such an act; for if he was insane, how could "he remember that he did the act."

May avoid in person.

This, not being founded on principles, will not be considered as law, with us; but acts done during lunacy, may be avoided by the lunatic, in person, when restored to reason, or by his heirs.

Persons under duress.

Persons under duress, may avoid any act extorted from them by force or compulsion.

Conveyances by power of attorney.

3d. It gives a Legislative sanction to conveyances made by virtue of a power of attorney from the rightful owner. For a power of attorney gives, in the legal sense of the word, an authority; but from the spirit of

Power to be authenticated, etc.

of the act, such power of attorney must be executed with every requisite of a deed of conveyance, and be authenticated by acknowledgment and record, in precisely the same manner.

The word authority may likewise be extended to officers, commissioners, and to all persons empowered

by law to convey land, in which they have no personal interest, and to place conveyances executed by them, in virtue of such power or authority, upon the same footing, in point of formality, with other conveyances.

"Attested by two or more witnesses," by subscribing their names to the deed.

Witnesses, their credibility.

The statute says nothing of the credibility, or competency of the witnesses; but it stands, with reason, that they should, at the time of attesting, not be persons, who, by law, are excluded from testimony generally, or who, from their situation, would be excluded from testimony in respect to this particular transaction. Under this last description, all the parties to the deed or conveyance, as well as their wives, are to be excluded from attestation.

Acknowledgment.

"And acknowledged by such grantor or grantors, before a Justice of the Peace." The party granting must personally acknowledge the instrument to be his free act and deed, before a Justice of the Peace, who is to certify the same by indorsement; but the acknowledgment may be supplied by the oath of the witnesses, or by other proof, in the case, and in the manner specified in the first and second proviso in this act.

Supplied in some cases by proof.

Effect of the acknowledgment.

Such acknowldgement of the party granting has the force to supersede the necessity of calling the witnesses to prove the execution of the deed, on trial; for such acknowledgment shall give it credit, *prima facie*, to be taken to have been executed, in the manner, and for the purposes specified in such deed. It will be *prima facie* evidence only; for any person or persons, against whom the deed shall be produced, may impeach the execution by legal proof.

The record.

"And recorded at length in the town clerk's record, where such houses or land do lie." There is, afterwards, a proviso in the act, that in towns where there

is, or shall be no town clerk elected, such grants, etc., shall be recorded in the county clerk's office, of the county where the lands lie. It will not be necessary, if after the deed be once recorded in the office of the county clerk, there should happen to be a town clerk elected in the town, etc., that the deed should now be recorded in that office; and if the town be set to another county, the record before made is sufficient. A deed once recorded in the office appointed by law at the time, has immediately its full operation.

Operation of the deed thus authenticated.

A deed of conveyance thus signed, sealed and delivered by the party granting, having good and lawful authority, that is capacity, right or power; and attested by two or more legal witnesses; acknowledged or, as the case may be, proved before proper authority; and recorded in the office appointed by this act, shall be valid to pass the houses or lands, according to the intention of the grant, and the right, interest and power of the parties granting, "without any other act or ceremony in law whatever," or which the law may have heretofore required, "want of livery of seizin, or attornment of the possessor notwithstanding."

Supersedes livery and attornment.

Livery in the feudal tenures.

Livery of seizin, under the feudal domination, was not a mere ceremony, but the very act of transferring the feud, for the intent then expressed, by the person transferring, before the peers of the county. It was, at first, by parole; afterwards, by writing; and was witnessed on the spot by the peers, or rather, the names of those present were entered by the clerk, at the foot of the writing, which came to be called a deed of feoffment, or, by way of eminence, a feoffment. Accordingly, livery of seizin is defined to be "a corporal investure of the land." After feudal tenures were abolished, livery of seizin, although a mere ceremony, still continued to be held necessary, in some instances, to the complete operation of a conveyance.

Attornment.

The same may be said of an attornment, which, under certain circumstance, came in the place of livery of seizin. Where the lord aliened to a third person, any lands in the possession of his tenants, who held of him by rent, or by any kind of feudal services, the law did not allow the lord to make livery of seizin on the land, because an entry on the land by the lord, was held to be a disseizin of the tenant. The attornment of the tenant was, therefore, introduced, to complete the title in the alinee, "and was," as Littleton saith,* "no other, in effect; but when the tenant had heard of the grant made by his lord, the tenant doth agree, by word, to the said grantee, I agree to the grant made to you, etc. But commonly to say, sir, I attorn to you by force of the said grant, or I become your tenant; or to pay a penny, etc., by way of attornment:" and this attornment had the effect of livery of seizin.

Intention of the 1st section.

The operation of this section is, not to set aside other modes of conveyance, before lawful; but to privilege this particular mode—to supersede all useless ceremonies, which had nothing but a veneration for antiquity to support them; to banish the technical, circuitous reasoning which had long perplexed the doctrine of conveyances, and, in this mode, to bring it back to common sense, to a direct transfer of the right, freely, simply, and absolutely.

2d Section.

To render this mode of executing, and autenticating conveyances universal, in this State, it is, in the next section enacted, "That no bargain, sale, mortgage or other conveyances of houses or lands, made and executed within this State, or attachment served thereon,

Conveyance not to be valid to hold, unless, etc.

* "*Et atturnment est nul auter en effect, forsque quant le tenant ad oye del grant fait per son seigmor, que mesme le tenant agrea per parol a le dit grant, sicome adire a le grauntee, Feo moy agree a le grant fait a vous, etc., ou Feo sue bien content de le graunt fait a vous; mais le pluis common atturnement est, adire, Sir, jeo atturna a vous per force del dit graunt, ou jeo deveigne vostre tenant, etc., ou liverer, al grantee un denier, ou un maile, ou un farthing, per voyd' attornement.*"—Coke Litt., p. 309, c. 10, sec. 155.

shall be valid in law to hold such houses or lands against any other person or persons, but the grantor or grantors, and defendant, and their heirs only; unless the deed or conveyance thereof be acknowledged and recorded in manner as is before expressed; or unless minutes be made of such mortgages in the town records; which minutes shall respectively contain the description and boundaries of the land mortgaged, the names of the mortgagors and mortgagees, the mortgage money, the times when payable, and when registered; or unless an attested copy of such attachment, and the officer's return thereof, be filed in the said town clerk's office.

Mortgages

Attachment.

Operation of the 2d section.

The former clause added little or nothing to the common law requisites of a deed of conveyance, except the acknowledgment and record; and the latter clause is confined to the acknowledgment and record only. If a conveyance have every other requsite, and want these two, it shall not be valid to hold, that is, it shall be void against all creditors and subsequent purchasers; but shall be good against the grantor, for he cannot be injured for want of notoriety. It will be good against the heirs of such grantor; for, as heirs, they are not exposed to any injury or loss by the neglect.

Construction.

Upon this clause there arise several questions of construction, on which the whole beneficial operation of the act depends.

1. Suppose that A. conveys to B. a piece of land, by deed, under his hand and seal, properly attested and acknowledged, and B. neglects to record his deed; afterwards C., without any notice of B's. deed, purchases of A. the same lands, who executes to C. a good deed, and acknowledges it before proper authority, and the deed be recorded according to law. Afterwards B. procures his deed of the same lands to be recorded.

Subsequent purchaser without notice, if his deed be first recorded, shall hold the land.

The question is whether by the genuine construction of the statute, the title, as against B., is vested in C., on his deed being first recorded.

The preamble will serve as a key to the intention of the Legislature on this point. "To the intent it may be better known what title, or interest, persons have in or to such estates as they offer to sale." As much as to say, "To the intent that no purchaser shall be deceived by prior and secret conveyances, which he has it not in his power to discover," let all deeds and conveyances of houses or lands be recorded; and if not recorded so that subsequent, *bona fide* purchasers of the same houses or lands, by repairing to the records, may be ascertained of such conveyances; the same shall not be valid to pass; that is, against such purchaser, it shall be utterly void, and the prior purchaser shall suffer the loss in consequence of his own laches. No other construction can give a beneficial operation to the statute, agreeably to the apparent intent of the Legislature. Let the loss fall where the neglect has been. But if C. neglect to record his deed, and B's. shall be first recorded, and afterwards C's., here there has been a neglect in both; and B., through the laches of C., having procured his deed to be first authenticated by record, shall hold the land.

Reason of this construction.

If subsequent purchaser neglects, the former may hold.

2. In the case above put, if C. had full notice of B's. title, though the deed should not be recorded, and he then proceed to purchase, and first record his deed, whether he shall hold the land against B., notwithstanding such notice?

Subsequent purchase, with notice, fraudulent, therefore void.

No man can, with a good conscience, take advantage of the laches of another, to his direct injury, unless where it is an even cast, that is, where there must be a loss on the one side or the other. In such case, the first in diligence shall be the first in right. This

is frequently the case between creditor and creditor, and sometimes between creditor and purchaser. The rules of law ought never to be so construed, as to oppose the nicest sense of moral obligation. As moralists, we condemn the transaction. If we refer to the intention of the Legislature, "to the end it may be better known, etc.," it is evident that C., in the case last put, having notice of B's. previous purchase, was not within the mischief, and, therefore, not within the equity of the remedy. This was so determined in the cause of Morris, *ex dem.*, Ludlow vs. Gill. It is clear from these principles, that C's. deed, in this case, as against B., is void. It is also a fraudulent conveyance, within the equity, if not within the very letter of the third paragraph of the "Act for the prevention and punishment of frauds and perjuries."

Ante. 64. Worsley et al vs Demattos & Slader. 1 Burr. 477

Where a prior purchaser conceals his purchase, to deceive a subsequent purchaser.

3. If, in the case first put, B. not having recorded his deed, be present, and fully conusant of C's. purchase, and give C. no information, and should immediately procure his deed to be recorded, before C's.; whether B. should, in this case, hold the land against C?

It is fraudulent and will postpone the prior purchase.

Ivers vs. Chandler. Ante. 61.

This would clearly be a gross fraud upon the statute. It would be making a dishonest and injurious advantage of a willful neglect. B's. deed ought, in this case, by retrospect, to be considered as originally fraudulent, and designed for an imposition, and so void, as against C.

Of attachments and mortgages, nothing need be said; but it may be necessary to observe that the word *land*, in this statute, comprehends not only lands in the literal sense of the word, but every interest in, or issuing out of land; and is so far equivalent to the word *tenements*. It is, therefore, necessary that grants of life estates, terms for years, and all other grants, which incumber the lands, or derive to the grantee any right

Meaning of the word land in this statute.

Grants of what estates are comprehended in this estate.

to issue out of the land, should be acknowledged and recorded, or they are not valid to pass within the statute.

A deficiency as to devises, and partition of intestate estates.

To complete the notoriety of titles to lands, and bring the whole under one view, the laws are still deficient in two instances. Wills, by which lands are devised, are not required to be recorded in the same office with deeds, nor the partition made, by order of the Judge of the Court of Probate, among the heirs of intestates. The remainder of this statute needs no explanation.

A DISSERTATION

ON THE

STATUTE OF OFFSETS.

"AN ACT FOR ALLOWING AND REGULATING OFFSETS."

1st Section. Clause I.

BY this Statute it is enacted, "That if the plaintiff, in any action depending before any court, on bond, bill, note, or other contract, shall be indebted to the defendant in such action, the defendant, after pleading the general issue, or confessing the plaintiff's cause of action, may plead an offset of any sum or sums due to him from the plaintiff, as aforesaid."

It is observable upon this clause, that a defendant is allowed to plead an offset in those actions, which are founded on contracts only; not in those which are founded on torts. The words *indebted*, *due*, are here to be taken, not in their appropriate signification, as confined to specific sums and liquidated demands, but more generally, for any demand which one man has against another, by virtue of an express or implied contract, whether of a specific sum, or subject to estimation. The distinction between debt and damage, does not reach the meaning of the statute. An assumpsit founds wholly in damages, and yet is founded on contract. An action of debt lies against an officer for an escape, both negligent and voluntary, and yet the action is founded on a tort. By a proper attention to this distinction, we shall be able to determine with precision, in what kind of actions offsets are allowed, and in what they are not. The same observations may be

What demands may offset.

They must be founded in contract, express or implied.

applied to the nature of the demand, which the defendant is allowed to plead in offset; for he may plead an offset of any sum or sums due to him from the plaintiff, as aforesaid, that is, on bond, bill, note, or other contract.

2d Clause.

"Which plea shall be in the nature of a declaration in one or more counts, as the nature of the case may require; and if the plaintiff shall plead the general issue to any or all the counts in the defendant's plea, or shall confess the cause of action contained in any or all the counts in the defendant's plea, he may in like manner plead an offset of any sum or sums due to him from the defendant, as aforesaid, and the issue and pleadings being closed, the jury shall be directed to find generally such sum or sums as shall be found in arrear from either, and judgment shall be rendered thereon accordingly."

By this clause the plaintiff is allowed to reply to the defendant's plea of offset, by offering, in the same manner, to offset any further demand which he may have against the defendant, of the same nature; that is, any demand arising on contract.

Beneficial law

This is indisputably one of the most equitable and beneficial laws to be found in any code. It is calculated on the maxim, *Interest republicæ ut finis sit litium*—"It is the interest of the State to terminate litigations." It serves to control the litigious spirit of suitors, by involving their interest alternately in a full settlement of every litigated demand, with a great saving both of time and expenses.

Demands must lie in the same right.

One distinction relating to the right, in which any demand is claimed to be due, though not expressed in the statute, exists in the nature of the thing. The demands of both plaintiff and defendant must be mutual, that is, in the same right, or they will not be allowed to

offset one against the other. To illustrate this by example: A is executor or administrator of B., brings a suit against D. for a debt due to his testator or intestate. Here A. brings the action *in alieno jure*—he represents the right of another. In this case, D. may offset any demand which he has against A., in the same right, as executor or administrator of B.; but no demand which is personal of A. Nor can A. reply in offset against D., any demand existing in his own right, but is confined to such only, as he claims in right of his testator, or intestate.

Executors and Administrators

The same rule holds in all actions for or against heads of corporations, trustees, assignees of bankrupts, and all persons who represent the rights of others.

Heads of Corporations, trustees, etc.

This construction is necessary to prevent a perpetual confusion, and even violation of rights. It would be grossly unjust in a trustee to apply the trust to his own benefit; and it would be no less unjust in the law to allow, much more to compel such application. The manner of pleading, and the duty of the jury, are pointed out too clearly to need any illustration.

Reason of this construction.

"That, where there are mutual judgments between the same parties, in any court (*in the same court*), such court may, on motion of either party, offset such judgments against each other, and execution shall issue for the balance only."

Section II.

Here it is expressed, that the judgments to be offset against each other, be mutual. This is to be understood, that they be between the same parties, in the same right, as was observed on the first paragraph.

"*Provided*, that no sum due on account, the balance whereof shall not be ascertained under the hand or hands of the party or parties; nor any bond, bill, note or other contract, not due or payable before the commencement of the plaintiff's action; nor any bill or

Proviso.

note sold, endorsed, or assigned to the plaintiff or defendant, shall be allowed in any plea of offset, unless it shall appear on trial, that notice of such sale, endorsement or assignment was given by the party holding such bill or note, to the opposite party, before the commencement of the plaintiff's action, which, in such case, shall be taken to be the day of serving the original writ in the action."

Accounts.

A sum due on account, and acknowledged under the hands of the parties, or the hand of the party, against whom the demand exists, is on a footing with other contracts; but where the account is still open, a different mode of trial is allowed, and the parties are, for certain purposes, admitted to their oaths. It would therefore create much confusion to allow such accounts to be plead in offset in actions, which have a different mode of trial, and a different mode of proof.

Contracts not due, etc.

The parties are not allowed to offset any demand which was not payable before the commencement of the plaintiff's action. Probably the Legislature considered that as such debts were not made payable at the same time, the parties in their contracts had not in contemplation a mutual credit, and it would be hard that the plaintiff should be over balanced and subjected to costs by reason of a demand which did not exist, in force, at the time when he commenced his action. Might it not, however, have been better, both in a public and private view, that such demand should have been allowed to the time of trial, saving the costs to the party, against whom it should be produced?

Quere.

Of endorsed notes and bills.

It is a very just and equitable provision, that no bills or notes sold, endorsed or assigned to either party should be allowed in any plea of offset; unless notice of such sale and endorsement, or assignment, shall have been given by the party holding the same, to the opposite

party, before the commencement of the plaintiff's action; were it otherwise, one of the parties might, by secret purchases of such bills or notes, often unexpectedly, and, indeed, unjustly, subject the other to costs. It is much more agreeable to the principles of right, that the debtor should employ his property directly in the payment of his debts, than that he should attempt it in a circuitous way, by such purchases, and with an expense and cost to the creditor.

'Bills' and 'Notes,' in the proviso, are attended with no descriptive words, which may serve to designate the particular species here intended. It may, however, be collected, both from the reason of the thing, and from the former part of the statute, taken in connection with the proviso. They must be bills and notes on which the party pleading can demand in his own name; on which the law, agreeably to principles already existing, would establish in him a right of action against the other party, in virtue of the endorsement. Such are those bills and notes only, which are called negotiable. This includes all bills and notes which are made payable to any person or order.

By bills and notes in the proviso, are to be understood those which are negotiable.

It is obvious to observe that the proviso gives no right; but that it limits a right supposed already to exist. It limits the generality of the impression in the first clause. It is there said, that if the plaintiff in any action, etc., be indebted to the defendant in such action, the defendant, after pleading, etc., may plead an offset of any sum or sums due to him in like manner, that is, on bond, bill, note, or other contract. This clause gives the parties a different mode of effectuating their demands, but gives them no new personal right in any contract. The parties are not authorized to plead in offset a debt due to others, but debts severally due to themselves. Every other bill or note, what-

The proviso gives nothing; but limits an antecedent right

The parties are not to plead in offset debts due to others.

ever assignments or endorsements may have been made, or powers of the most ample kind given to the payee, the assignee, or indorsee, remains, in consideration of law, as between the parties originally contracting, the debt, contract and demand of the indorser, to whom the bill or note was first and alone made payable. Negotiable bills and notes must have been alone in contemplation of the Legislature in this proviso, for it would have been unnecessary, and even absurd, to regulate or limit those matters in a proviso, which were not introduced in the body of the act, and upon which the proviso, therefore, could not operate.

These observations may appear superfluous to professional men, but I thought it necessary to be thus particular, in this point, because the question has been agitated in the lower courts, some of which have put a different construction on the act.

A DISSERTATION

ON THE

NEGOTIABILITY OF NOTES.

It is proposed, first, to take a brief view of the laws and practice upon promissory notes, payable to order, or bearer, as established in Great Britain; and, secondly, to consider them upon principles, independent of established laws and customs.

Propositions.
To be considered.
1. On the British law.
2. On principles.

Of the laws and practice upon promissory notes in Great Britain.

In Great Britain, there are two kinds of promissory negotiable notes; the one payable to some person, to A. B., for instance, or his order; the other to A. B., or bearer. Notes payable to order had been held to be negotiable by endorsement, at common law, as was observed in the case of Nicholson vs. Sedgwick; and actions had been sustained by the endorsee of such notes against the maker. In the same case it was said that an action had never been allowed in the name of the bearer, as such; and it was determined accordingly in that case. It was not, however, settled for law, that the endorsee of a note payable to order, might maintain an action against the maker, till the statute of the 3 and 4 of Anne. This statute recites that

British law on notes.

1. Ld. Raym. 180.

Rights of the endorsee on these notes, not settled at common law.

"Whereas it hath been held that notes in writing, "signed by the party who makes the same, whereby "such party promises to pay unto any other person, or

" his order, any sum of money therein mentioned, are
" not assignable or endorsible over, within the custom
" of merchants, to any other person; and that such
" person to whom the sum of money mentioned in such
" note is payable, cannot maintain an action by the
" custom of merchants, against the person who first
" made and signed the same; and that any person to
" whom such note shall be assigned, endorsed, or made
" payable, could not, within the said custom of mer-
" chants, maintain any action upon such note against
" the person who first drew and signed the same; there-
" fore, to the intent to encourage trade and commerce,
" which" (as it is there said) " will be much advanced
" if such notes shall have the same effect as inland bills
Enacting part. " of exchange. It is enacted, that all notes in writing,
" that shall be made and signed by any person or per-
" sons, body politic or corporate, or by the servant or
" agent of any corporation, banker, goldsmith, mer-
" chant, or trader, who is usually entrusted by him, her,
" or them, to sign such promissory notes for him, her,
" or them, whereby such person or persons, body poli-
" tic and corporate, his, her, or their servant, or agent,
" as aforesaid, doth, or shall promise to pay any other
" person or persons, body politic and corporate, his,
" her, or their order, or unto bearer, any sum of money
" mentioned in such note, shall be taken and construed
" to be by virtue thereof, due and payable to any such
" person or persons body politic and corporate, to
" whom the same is made payable; and also every such
" note, payable to any person or persons, body politic
" and corporate, his, her, or their order, shall be as-
" signable and endorsible, over, in the same manner as
" inland bills of exchange are, or may be, according to
" the custom of merchants; and that the person or
" persons, body politic and corporate, to whom such sum
" of money is, or shall be, by such note, made pay-

"able, shall and may maintain an action for the same, "in such manner as he, she, or they might do upon an "inland bill of exchange, made or drawn according to "the custom of merchants, against the person or per- "sons, body politic and corporate, who, or whose ser- "vant, or agent, as aforesaid, signed the same; and "that any person or persons, body corporate and poli- "tic, to whom such note, that is payable to any person "or persons, body politic and corporate, his, her, or "their order, is endorsed or assigned, or the money "therein mentioned ordered to be paid by endorsement "thereon, shall and may maintain his, her, or their "action, for such sum of money, either against the "person or persons, body politic and corporate, who, "or whose servant, or agent, as aforesaid, signed such "note, or against any of the persons that endorsed the "same, in like manner as in case of inland bills of ex- "change; and in every such action, the plaintiff or "plaintiffs shall recover his, her, or their damages, and "costs of suit."

I have inserted this statute at large, because it shows the situation of these notes at common law, and the grounds of subsequent decisions in their courts upon this subject.

After this act no question was made at common law.

After this act, no farther question was made whether such notes were assignable upon common law principles. It was sufficient that they were assignable by the statute, which put them on the footing of inland bills of exchange, the law of which had long been pretty well settled.

OF THE NOTE.

Resemblance of a promissory note endorsed, to a bill of exchange.

While a promissory note, payable to order, remains in the hands of the original payee, it takes none of the properties of a bill of exchange, except its negotiability. When it is once endorsed, it has the principal proper-

ties of a bill of exchange. The endorser becomes a drawer as well as an endorser. The endorsee is the payee; and the maker is the drawee, with this distinction, that as between him and the endorsee, he has already accepted the draught.

2 Burr, 676. Heylen, et al, vs Adamson.

OF THE ENDORSEMENT.

Endorsement may be struck out.

If a note have been endorsed to a third person, and not paid, the endorser may strike out the endosement, and recover in his own name. The endorsement is a direction to the maker to pay the contents to a third person, the endorsee. Every endorsee has the same right to endorse the note over, as the original holder.

May be endorsed from one endorsee to another.

It is usual for the endorser to sign his name blank on the note, to be filled on occasion; which may be done at any time before the cause goes to trial to the jury.

The endorsement by any person, who might himself maintain an action on the note, is good to transfer the right to the endorsee; as, by an administrator, on a note given or endorsed to his intestate; or by the husband, on a note given or endorsed to the wife, while sole: but the declaration must agree with the case.

By administrators, etc.

2 Stran., 1260.

ENDORSER AND ENDORSEE.

Endorser is a warranter.

The endorser is considered as warranting the note, on failure of payment by the maker. It is encumbent on the endorsee to use due diligence to obtain the money of the maker. He must apply, and make demand of payment of the maker, unless he have absconded; in which case he may go upon his endorser, without an actual demand, which he could not possibly make. The endorsee must not neglect an unreasonable time, or give farther time of payment to the maker; if he do, it is at his own peril; he takes all the

Endorsee must use due diligence or the endorser is discharged.

2 Burr, 676 Heylen, et al., vs. Adamson.

risk upon himself, and shall never resort to the endorser.

It has been held, that if the endorsee receive any part of the money of the maker, the endorser is absolutely discharged; for that credit is thereby given to the maker. The contrary has likewise been holden, which seems to be the most reasonable opinion. It is clearly for the advantage of the endorser, that any part of the money should be received. It is probable, that the circumstance of giving farther time of payment, being generally connected with that of receiving part of the money, gave rise to the former opinion.

Receiving part of the money of the maker held to discharge the endorser.

2. Stran. 457. Kellog vs. Robinson.

Contrary opinion. Bul. n. p. 271. 2 Will., 292. Johnson vs Kenion. On a bill of exchange

If the endorsee have used due diligence to demand the money of the maker, and the maker refuse or neglect to pay, the endorsee has a right of action against the endorser. If a note, payable at a future day, be endorsed generally, it is an endorsement to pay according to the tenor of the note. No laches can be imputed to the endorsee, until the note become payable. If the endorser appoint the money to be paid at an earlier day, though the endorsee may safely wait till the note become payable before he demand the money, yet he is not obliged to give this time to the endorser. He may, if the maker refuse payment, resort to the drawer, at the time set in the endorsement.

General endorsement to be taken according to the tenor of the note.

Money appointed to be paid before the note is payable Endorser holden to his time.

A note payable to A. B., or bearer, may be endorsed; and the endorsement will be a good warranty, as in the case of a note payable to order; but an endorsement is not necessary for transferring a right of action against the maker. Such right, according to the tenor of the note, passes by delivery from hand to hand. These notes are, in many respects, like bank bills, or bills of public credit. When passed without endorsement, they are, in the same manner, at the risk of the bearer, as to the ability of the maker.

Endorsement of notes payable to bearer.

OF PAYMENT.

Payment to the original payee, or a discharge by him to the maker, seems to have been admitted as a good defence to the maker. But it was admitted with great caution. The note must have been in the hands of the payee, at the time of the discharge or payment. The burden of proof, in this point, was thrown on the maker. It was of no avail that he had not notice of an endorsement; so that it was almost impossible to avoid a second payment. Hence an opinion has prevailed with many, that such defence was not admissible.

THE NEGOTIABILITY OF NOTES CONSIDERED ON PRINCIPLES.

There is, in this State, no statute directly authorizing the Negotiability of Notes; nor have there been any leading decisions in point. In England it was formerly doubted, not only whether the endorsee of a note could, in his own name, maintain an action against the maker; but whether this could be done by the original payee on the note itself. The statute of the 3 and 4 Ann. recites these difficulties, and provides a like remedy in both cases.

It is not now doubted, but that a declaration on a note is good, and that the payee may, on common law principles, maintain an action on the note against the maker.

Holt opposed to the action on note 1 Raym. 157.

Lord Holt was strenuously opposed to such action. At the same time he allowed the note to be good evidence on an *indebitatus assumpsit*. The true reason was, that notes having been but recently introduced, no provision had been made by the ancient rules of law for this form of action. It is clearly one of those cases in which forms were long allowed to control, and, sometimes, even to exclude principles.

As to the negotiability of notes, the great objection was that they were mere *choses* in action; and it was a maxim of law, that a *chose* in action cannot be transferred. In the case of bills of exchange, the custom of merchants had prevailed against the maxim; and they had long been holden to be transferable by endorsement. Before the 3 and 4 of Ann., promissory notes had been introduced, and the merchants had attempted to make them negotiable by endorsement; but their negotiability had not been steadily allowed in the courts of law, as was observed above. It cannot, therefore, be said to have been established by the practice of the common law, and to have passed to us through that channel. The idea, however, has not a little prevailed that notes, payable to order, are negotiable, and endorsees have, in some instances, maintained actions upon them in the lower courts, in their own names.

Objection to the negotiability of notes, a chose in action not transferable

They were not established by the common law practice in England.

If such action can be maintained in this State, it must be on principles of right, arising from the nature of the transaction itself. We will enter a little more at large into this subject, and see if we can discover principles which will be sufficient to support the negotiability of notes, and how far such principles extend.

With us it must depend on principles.

The form of the contract between the maker and original payee is this: *Value received, I promise to pay A. B., or order, Ten Pounds, lawful money, one month after date.* The substance of which may be thus expressed: "Whereas I, C. D., am indebted to A. B. in the sum of ten pounds, lawful money, I promise and engage to pay to A. B. the sum of ten pounds, in one month from the date hereof; or, if it shall be more convenient for A. B., I will pay it to any one whom A. B. shall, by his order, appoint; and any person who will, by satisfying A. B. for the contents, procure his order therefor, shall be entitled to receive the aforesaid sum of ten pounds, in the place of A. B."

The contract is expressed in the note.

Explained.

It clearly implies this general proposal, that if any person will pay to A. B. the contents of the note, the maker will, on the producing of the note, and an order endorsed accordingly, pay to such person the full sum due.

Endorsee is equitably entitled according to the tenor of the contract.

It is clear, then, that by complying with the proposal, paying the debt to A. B., and taking his order, such third person, the endorsee, acquires an equitable right to demand the money of C. D., according to the tenor of the engagement. The endorsee has paid the debt of C. D, and taken the order with his approbation; not, indeed, a particular, but a general approbation.

The maker has given the payee a power to appoint the payment to a third person.

From the nature of the contract, fairly expressed, C. D. has given to A. B. a power of appointing a third person, who shall demand the money to his own use. In other cases such appointments have been holden good, to vest a right in the appointee. In a family settlement, a sum of money is to be paid to such person as P. shall appoint. P. appoints it to be paid to S. In this case, a right vests in S., on the appointment of P., to demand the money, and that without any act done, or consideration advanced on the part of S. It matters not whether the right of S. be at law, or in equity. It is now well agreed that a right which is sufficient to found a decree in equity, is sufficient to support an action at law. In the case here put, the nominor has no interest in the money. He has only a naked power of appointment. This is certainly going farther than the case of negotiable notes. Here the original payee has an interest in money, as well as a power of appointment. He may either receive the money himself, which will discharge the whole contract, and, consequently, the right of appointment; or he may appoint it to be paid to a third person, by en-

Appointment good to vest a right.

Even where the nominor has no interest.

dorsement. It is still a stronger case for the endorsee, that he is an appointee, for a valuable consideration.

The endorsee is an appointee for a valuable consideration.

There is, likewise, as to the right of the endorsee, an analogy to the case of a person contracting with a servant, agent or factor. If A. give to C. a credit to make certain contracts on his A's. account, and this credit be held out to the public, or to individuals, with whom C., the agent, negociates, those who contract with C. on that credit, will have good right against A., though they might never have seen him. The case on a negotiable note does not go farther. The maker empowers the original payee to make a contract, which shall bind him, the maker, viz., to make an order to a third person. the endorsee, upon such consideration as he shall choose, and engages to pay the order.

Analogy to the case of an agent &c.

After all, no two cases, as to original principles of right, can be more precisely the same, than the case between the payee, and acceptor of a bill of exchange; and the case between the endorsee and the maker of a promissory note, payable to order. The endorsement is, to every intent, a bill of exchange. The note authorises the draft, and contains a previous acceptance, subject, perhaps, to one condition, which will hereafter occur. It was judged, upon the best ground, in the case of Pillan and Rose, *vs.* Van Microp and Hopkins, that an agreement to accept a bill to be drawn, was an acceptance to bind the drawee, when the bill should be drawn accordingly.

Maker is holden to the endorsee precisely as the acceptor of a bill of exchange to payee

3 Burr. 1663. A previous agreement to accept is an acceptance. Havens vs. Griffin. Ante. 43

The same principle, which applies to the negotiability of notes, was adopted or conceded by the Judges of the Common Pleas, in the case of Fenner *vs.* Mears. Mears borrowed of Cox, on two respondentia bonds, upon an Indian voyage, £1000; and to enable Cox to raise money by an assignment of the bonds, signed hereon an endorsement to the following purport: that

Fenner vs. Mears. Is a similar case as to principles. 2 Blac, Rep. 1269.

the sum contained was due to Cox, and that he would pay the same to Cox's assignee, without any deduction or abatement. Afterwards, Fenner advanced money to Cox, upon an assignment of these bonds. Mears returned with the ship, having performed the voyage; and Fenner, by one Evans, informed him of the assignment, and requested payment. Mears desired time, and that Fenner would not sue him; but delaying payment, Fenner brought an action against him for money had and received. There was a verdict for the plaintiff, and a motion for a new trial, because, it was said, the endorsement on the bonds could not make them assignable, so that Fenner could recover in his own name.

An endorsement on a bond promising to pay to any person to whom the bond should be assigned, binds to pay to the assignee.

Judge Blackstone observed, that from a caution, lest by turning a specialty debt, by assignment, into a simple contract, some consequences might arise, which he could not then foresee, rather than from any great doubt attending the case, he choose to go on clearer grounds in determining the particular question. He was of opinion that Mears had made a sufficient promise after his return. Chief Justice De Gray, and Justice Nares, held clearly, that Fenner had a good right of action, in virtue of the endorsement by Mears, and the assignment by Cox. The plaintiff, said the Chief Justice, is certainly entitled to the money, in conscience, and therefore, I think, entitled at law.

The maker, who has not paid, can set up no honest defence against the endorsee.

Let us see what defence the defendant can set up against an endorsee. It is true, says he, that I gave the note to A. B., for ten pounds due to him; that I promised to pay the money to him, or to any person who would procure his order endorsed. It is true that I have never paid the money, and the plaintiff has, by paying my debt, from a reliance on my written word, procured an order endorsed from A. B. That accord-

ng to the expression in the note, the plaintiff might have expected me to pay him the money; but the law does not allow the endorsee to recover in his own name. This is certainly the fairest defence which can be made upon the statement, and is a gross evasion, founded in injustice.

Notes payable to order assignable on legal and equitable principles.

It appears, therefore, that notes payable to order, are, on every just, legal, and equitable principle, assignable by endorsement; and that an endorsee may rightfully maintain an action, in his own name, against the maker.

† A new matter, or unaffected by precedents.

As this may be considered in this State, †*res integra*, we are not obliged, on this subject, to follow the reasons and policy of the English law. We are at liberty to make such decisions as shall, in a general view, be agreeable to justice, and the nature of the transaction.

How far the endorsee is holden to warrant.

To consider the endorser of a note, who has received the money of his endorsee, as warranting the ability and punctuality of the maker, the same as on a bill of exchange, in respect to the drawee, is agreeable to justice. It is equally agreeable to justice, that the endorsee should use due diligence to obtain the money of the maker, who is to be considered as an accepting drawee; and that if he be guilty of any unreasonable neglect, either in demanding the money of the maker, or in giving notice of non-payment to the endorser, he should be holden to take the risk upon himself, and to discharge the endorser of his warranty.

Endorsee must use due diligence, otherwise it is at his own risk.

For this opinion there are two good reasons. 1st. From the silence of the endorsee, the endorser may well conclude that the money has been received, and make his arrangements accordingly. 2d. During the time of delay, the endorsee, possessed of the note,

prevents the endorser to take any measure to secure or recover the money of the maker.

Subsequent endorsees within the same reason.

These reasons will hold equally between any subsequent endorsee, and all the endorsers; against either of whom he may have his remedy, on failure of the maker to pay.

There are two cases worthy of consideration. One is between the endorser and endorsee; the other between the endorsee and the maker.

Case between endorser and endorsee.

The first, between the endorser and the endorsee, is where the immediate endorser is discharged of any warranty, either by agreement, at the time of endorsement, or through the neglect of the endorsee. If through the neglect of the endorsee, the endorser be discharged, and the note be afterwards endorsed to a third person, the liability of the first endorser is not revived, though the last endorser had no knowledge of the neglect of the intermediate endorser. Were it otherwise holden, it would be an easy matter, by subsequent endorsements, perpetually to charge the first endorser, which would be very unjust.

Neglect of the first endorsee runs against every subsequent endorsee

If a note be endorsed generally, "value received," no private agreement should avail against a subsequent endorsee

An agreement between the endorser and endorsee, has an appearance of more difficulty. If a note be endorsed, "Value received, pay the contents to C. D., or order," it includes every subsequent endorsement, *ad infinitum*. The last endorsee has the same remedy against the first, and every intermediate endorser. No private agreement ought to be allowed to contradict what is so held out in the endorsement. The reason is plain. It would be to allow the endorser to hold out a deception. The endorser, between him and his immediate endorsee, might make every defence allowed to a note of hand; and would, as I conceive, be admitted to proof, under the same limitations. Where the word *order* is omitted, notwithstanding some opinions to the contrary, it is, on the face of it, a limited

If the word 'order' be omitted, it is a restricted endorsement.

contract between the endorser and his immediate endorsee. A subsequent endorsee must take the note on the credit of his immediate endorser. The contract, as to the warranty, is between them only. Setting aside the custom which has obtained in England, there can be no deception. Nothing on the face of the contract warrants a supposition that the endorser will warrant to any future endorsee. There is nothing to support even the fiction of a privity for this purpose. To carry the sense of the word *order*, in the note, which, in reference to a bill of exchange, is the expression of the acceptor, into the endorsement, which is the act of the drawer, so as to bind him in a harsh and unnatural construction. If, for the convenience of a subsequent endorsee, to enable him to recover of the maker, the word *order*, on the face of the note, be implied in the endorsement, it will, perhaps, be an injury to no one; but to imply it for the sake of a remedy against the first endorser, is to introduce, by implication, that which was carefully avoided in the expression.

It implies no warranty to a subsequent endorsee.

It is frequent for notes to be endorsed blank, and to pass from hand to hand, either with or without any subsequent endorsement, and for the blank to be filled up on occasion. Here a question has been made, whether the person who receives a note thus endorsed blank, may not fill up the blank with any kind of endorsement, as he shall choose.

Notes endorsed blank.

May not be used by the endorsee contrary to agreement.

Between the endorser and his immediate endorsee, it is clear that no use can justly and equitably be made of the endorsement, substantially different from the intention of the parties at the time of endorsing. Proof therefore ought to be admitted between these parties, to show what was that intention.

Proof may be admitted of the intention.

If an endorsee, who had received a note thus en-

Endorsement filled contrary to agreement, and passed without notice.

dorsed blank, for a particular purpose, should afterwards fill up the blank with a general endorsement, and without giving notice of the agreement between him and his endorser, endorse the same note to a third person, it might, at first view, seem to admit a different consideration. It may be said, that by neglecting to fill up the blank according to the agreement, the first endorser had at least put it in the power of his endorsee to exhibit him as a warrantor; which, if allowed to be controverted, might prove a deception upon third persons.

The subsequent endorsee ought to trust to the honesty of his endorser for the right he has against a prior endorser.

Notwithstanding this consideration, I cannot but think it more agreeable to justice and equity, that the subsequent endorsee should, in this point, trust to the honesty and credit of his endorser, with whom alone he is concerned in contract. Were this established for law, there would be much less room for deception, than upon an admission of the contrary doctrine.

It is true, the credit of every endorser may add to the credit of the note. But this, on a contract for a transfer, is an advantage to the seller, not to the buyer. I see no good reason why a construction should be forced, to give him an advantage to which he is not, in equity, entitled, which he cannot take, with a good conscience, and for the sake of the buyer, who is a mere volunteer, to allow the seller to bind a third person, contrary to agreement.

It is here considered, independent of custom.

A custom may alter the reason

I here go upon a supposition, that no custom has, in this case, been established. The prevalence of a general custom frequently alters the reason of cases. It is, while remaining in force, equal to a general agreement.

If a note endorsed blank pass through several hands, to what purpose the endorsement shall serve.

Where the note passes through several hands, the name of the original payee remaining endorsed, in blank, may well justify the sale of the note, by authorizing the holder to receive the money; but as to any

other purposes, it ought to be taken subject to the agreement made on the first endorsement. If A., for instance, sell a note to B., at the risk of B., and endorse it blank; and B. sell it to C., without giving notice of the agreement with A., or should he falsely affirm that A. was holden to warrant, the deceit of B. ought not to injure A. C. ought to look to B., with whom he dealt, and to whom alone he had a right to give credit. If a custom have not prevailed to suggest the idea, no one would suspect that a name only, written on the back of a note, had anything to do with a warranty.

It ought, as to the first endorsee to be subject to the agreement made at the time.

A name endorsed without a custom, implies no warranty.

To consider this matter in another point of light. A. employs B. to transact a certain piece of business, and signs his name on a blank paper, for the purpose of filling up a receipt in the course of that business. Instead of a receipt, B. fills up a note against A., payable to himself or order. None will hesitate to pronounce this to be a complete forgery; and that the note, whether in the hands of B, or of his endorsee, would, on proof, be utterly void against A. There can, in point of substantial justice, be no difference between the case put, and that of a blank endorsement filled contrary to an express agreement. The latter is *in foro conscientiæ*, equally criminal with the former, and ought to be deemed equally void.

A case of forgery.

To sell an endorsement contrary to agreement, equally fraudulent.

The second case, as mentioned above, between the maker and the endorser, is, where the payee himself could not maintain an action against the maker, either because the maker had made full payment to the payee, or obtained a discharge from him, before the endoresment, or rather, before notice of the endorsement; or because the note was originally obtained by fraud, imposition, or on an illegal consideration; where the maker has paid before endorsement, and neglected to

Case between the endorsee and the maker.

take up his note; the question occurs, shall the maker of the note, because he has neglected to take it up, or to have it cancelled, although he has honestly paid, be still holden to the order of the payee? In favor of the endorsee, it is said that the promise to pay to A., or order, is a general promise to pay to any person, who shall procure such order; and that to suffer any private transaction between the maker and original payee, to deprive a third person who had dealt, *bona fide*, of the benefit of his order against the maker, is to suffer one man to be imposed upon through the neglect of another. This argument, however, will have no weight without a general custom to support it. The promise contained in the note imports no such thing. "I promise to pay to A., or his order," that is, to one or the other, who first demands—not to both. If the maker have fulfilled his promise to A., the contract is clearly discharged. A. has not a **scin tilla juris* to demand anything farther on the contract. He has, in fact, no demand to assign. Shall his endorsement, which is in itself a fraud, convey or revive a right against the maker, who has honestly paid according to agreement? This would be to enable A., by the intervention of an endorsee, to effectuate a fraud, which he could not have done in his own name. The endorsee in this case is a volunteer. He is under no necessity to purchase this particular note. He deals with A. alone. He is at full liberty, if he distrust the honesty of A's. representation, to take security or refuse the contract. Let him trust for security where he deals, and take his remedy against the man who deceived him. CAVEAT EMPTOR, *beware purchaser*, may in this case, with great propriety, be applied to the endorsee. If he have neglected to secure himself against A., he ought to suffer the loss.

The promise to pay A or order, is to one or the other, not to both.

If the maker have paid to A., the right is extinguished; no right remains to be assigned.

* A spark or glimpse of right

Endorsee is a volunteer purchaser.

Ought to secure himself against his endorsee.

It is but reasonable that the maker should be bound only by notice of the endorsement; and, that in all such questions, to charge the maker on the alternative of his promise, to pay to the order, the proof should come on the part of the endorsee. It is a matter in his own knowledge; and it is in his own power to fix the maker, by notice of the endorsement. The maker has good reason to suppose his contract to remain in *statu quo*, until he be informed of a change of parties, and to make his payments accordingly.

Proof of notice should come on the part of endorsee.

Maker not to be bound unless notified.

The same reasons hold with equal, if not greater force, where, between the maker and original payee, the note was obtained by fraud, imposition, or on an illegal consideration.

Where the note was obtained by fraud, endorsed ought not to recover.

In the English laws, there have been many hard constructions against the makers of notes, in favor of endorsees; but such constructions have not always prevailed.

Hard constructions in the English law, have not always prevailed against the maker.

By the 9th Ann., c. 14, f. 1, it is enacted that, "all notes, where the whole or any part of the consideration is money knowingly lent for gaming, shall "be void, to all intents and purposes whatever." In an action brought by the plaintiff, as endorsee of several promissory notes, it appeared that the notes were given to one Church, for money by him knowingly advanced to the defendant, to game with, at dice; that Church endorsed them to the plaintiff, for a full and valuable consideration; and that the plaintiff was not privy to, or had any notice that any part of the money for which the notes were given, was lent for the purposes of gaming.

By 9 Ann., notes given for money lent to game with, void

2 Stran., 1155. Bowyer vs. Bompton.

Upon this case a question arose, whether the plaintiff, a *bona fide* and innocent endorsee, could maintain an action on these notes, against the defendant? After two arguments, the Court were of opinion that he

A note given for money lent to game with, held void in the hands of a bona fide and innocent endorsee.

could not. "For," said they, "it will be making it of some use to the lender, if he can pay his debts with it; and it will be a means to evade the statute, being so very difficult to prove notice upon an endorser. And though it will be some inconvenience to an innocent man, yet that will not be a balance to those on the other side; and the plaintiff is not without remedy; for he may sue Church on the endorsement. It is but the common hazard of taking notes of infants, and femes covert."

Less favorable than the case of previous payment.

These reasons are much more conclusive in favor of the maker of a promissory note, who has paid the money before endorsement, or rather, before notice; or where the note was obtained by fraud, imposition, or upon a consideration, which was illegal, as being *malum in se*.

Here the maker is innocent. He has been punctual; he has been honest. In that case, the defendant was not innocent. He had received the full value of Church, and screened himself under a statute, which had more regard to public policy, than private honesty.

The law of nature against fraud, ought to have equal force with an act of legislation.

That no one should benefit himself, or legally charge an innocent man, by a fraudulent act, is a law of nature, of reason, and common honesty, which ought not to be less regarded in the administration of justice, than acts of legislation.

After endorsement, and notice to the maker, he cannot honestly, or safely, make further payment to the original payee. He is then holden to the second part of the alternative in his promise, to pay to the order.

Notes payable to bearer, within the same reason with notes payable to order.

It will readily be perceived, that the same arguments will apply to the case of notes payable to bearer. They are equally negotiable, according to the true intent of the contract. But as, upon a literal construc-

tion, no endorsement, nothing but a delivery from hand to hand, is necessary to pass the right, they might, in practice, open a door to many frauds and secret impositions. A remedy might, however, be applied consistantly with the nature of the contract, and the principles of justice. The holder of such note, that he may be entitled to demand of the maker, must be a *bona fide* bearer. Let it, then, be insisted, that the bearer, in order to establish his right of demand, shall prove himself a *bona fide* bearer, by producing an actual endorsement of the note. This would be no more than just, and would, perhaps, obviate every reasonable objection arising from the danger of secret fraud.

More subject to frauds.

May be remedied by insisting that they be endorsed, to give a right of demand.

[END OF THE DISSERTATIONS.]

APPENDIX.

RULES OF THE SUPREME COURT OF THE STATE OF VERMONT.

ADDISON COUNTY.

SUPREME COURT—AUGUST TERM, 1790.

IT IS ORDERED, That after the present circuit, all actions cognizable before this Court, shall be entered on the first day of the sitting of the Court, and not after.

By order of the Court,
N. BRUSH, *Clerk.*

CHITTENDEN COUNTY.

SUPREME COURT—AUGUST TERM, 1791.

IT IS ORDERED BY THE COURT, That all causes brought to this Court, by appeal from any County Court, shall be heard, tried and determined upon the pleadings in the Court below; unless one of the parties in the Court below shall think he has missed his plea, replication, rejoinder, etc. In which case the party so missing his plea, replication, rejoinder, etc., shall have liberty to alter or amend the same, or plead *de novo*, as the case may be, on giving to the adverse party notice in writing, of such alteration, amendment, or new plea, etc., at the time of granting such appeal, or not less than thirty days before the Court to which such appeal shall be entered.

Provided, nevertheless, On the first or second day of the Court setting, that upon motion and sufficient cause, the party who shall have missed his plea, replication, etc., and not given notice as afore-

said, shall have liberty to alter or amend, or plead *de novo*, by paying down to the adverse party such reasonable cost as they shall award for such neglect.

By order of the Court,
N. BRUSH, *Clerk.*

ORANGE COUNTY.

SUPREME COURT—SEPTEMBER TERM, 1791.

IT IS ORDERED BY THE COURT, That on the entry of every writ of error, the plaintiff in error shall deliver to the Court a fair copy of the writ of error, with the assignment of the errors. And whenever an issue of law is joined on special pleadings in any cause, the party demurring shall in like manner furnish the Court with a fair copy of all the pleadings in the cause on his filing his demurrer.

By order of the Court.
N. BRUSH, *Clerk.*

ORANGE COUNTY.

IN CHANCERY—SEPTEMBER TERM, 1791

IT IS ORDERED, That the plaintiff or plaintiffs in every suit in Chancery, shall deliver to the Court a fair copy of his, her or their bill, at the opening of the Court on the second day of the term in which the bill is filed. And the defendant or defendants, in like manner, shall give to the Court a fair copy of his or their answer, plea, or demurrer, at the time of filing the same with the clerk.

By order of the Court,
N. BRUSH, *Clerk.*

FORMS OF SPECIAL PLEADINGS.

RECORD OF A CAUSE BEFORE THE COUNTY COURT.

Assumpsit on Note, with several Pleas of Offset.

JAMES JINKS *vs.* JOHN SIMPSON.

RUTLAND COUNTY. } *Be it remembered*, That at a County Court, holden at Rutland, in and for the County of Rutland, on the —— day of November, in the year of our Lord, 1791, John Simpson, of Rutland, aforesaid, was summoned to answer to James Jinks, of Pittsford, in the county aforesaid, in a plea of the case; whereupon the said James Jinks, who comes by H., his attorney, declares and says, That on the first day of May, in the year of our Lord, 1790, at Rutland, aforesaid, the said John Simpson did make and deliver to the said James, his certain note in writing, commonly called a promissory note, signed with the proper hand of him, the said John, and bearing date the day and year last aforesaid; in and by which said note, the said John promised the said James to pay to him, for value received, the sum of fifty pounds, lawful money, on the first day of May, which should be in the year of our Lord 1791, with the lawful interest for the same. By the reason whereof, the said John became liable to pay to the said James the aforesaid sum of fifty pounds, according to the tenor and effect of said note; and being so liable, the said John afterwards, to wit, on the same first day of May, in the year of our Lord 1790, at Rutland, aforesaid, did, in consideration thereof, assume upon himself, and to the said James faithfully promise to pay the aforesaid sum

Declaration.

of fifty pounds, according to the tenor and effect of said note; nevertheless the said John, not regarding his promise and assumption aforesaid, hath never performed the same, although often thereto requested, to the damage of the said John, as he says, the sum of £70, lawful money, to recover which, with his costs, he brings this suit.

Defendant's appearance. At which day the said John Simpson comes into Court here, by C. D., his attorney, and prays a continuance in his behalf, until the next County Court, to be holden in Rutland aforesaid, in and for the county

Continuance. of Rutland; and it is granted; and the same day is given as well to the said James, as to the said John. At which day come the said John and the said James, by their attornies, aforesaid; and the said John, by his

Pl. non ass. said attorney, pleads and says, that he did not assume and promise in manner and form as the said James, in his declaration hath alledged, and thereof puts himself on the country for trial. And the said James doth the same.

Plea of offset. And for farther plea, the said John says, that the said James is indebted to him, the said John, in divers large sums of money; for this, to wit, that at Rutland, aforesaid, on the first day of October, in the year of

1st. Count, note our Lord, 1790, the said James made and delivered to the said John his certain note in writing, commonly called a promissory note, signed with the hand of the said James, and bearing date the day and year last aforesaid; in and by which said note, the said James promised the said John to pay to him, for value received, the sum of £10, lawful money, on the first day of January then next, and before the commencement of the said James' present action; whereupon the said James became liable in law to pay to the said John the aforesaid sum of £10, according to the tenor of said

note; and being so liable, the said James afterwards, to wit, at Rutland aforesaid, on the same first day of October, in the year of our Lord 1790, did, in consideration thereof, assume upon himself, and to the said John faithfully promise to pay to him, the aforesaid sum of £10, according to the tenor of said note. And also for this, to wit, that at Rutland aforesaid, on the first day of October, in the year of our Lord 1791, and before the commencement of the present action of the said James, the said James was indebted to the said John in the sum of £30, lawful money, for so much money by the said John advanced, laid out, and expended for the use of the said James, at his, the said James', special instance and request; whereupon the said James became liable in law to pay to the said John the aforesaid sum of £30, and being so liable, did afterwards, to wit, at Rutland aforesaid, on the day and year last aforesaid, in consideration thereof, assume upon himself, and to the said John faithfully promise to pay to him the aforesaid sum of £30, when he should be thereunto requested. And also for this, to wit, That whereas on the 4th day of May, in the year of our Lord 1791, the said James made and delivered to one Titus Thompson, his certain note in writing, commonly called a promissory note, signed with the hand of him, the said James, and bearing date the day and year last aforesaid; in, and by which said note, the said James promised the said Titus to pay to him, or to his order, the sum of £20, lawful money, within one month after the date of said note, with lawful interest for the same. And afterwards, to wit, on the first day of July, in the year of our Lord, 1791, and before the commencement of the present action of the said James, the said sum of £20 being then and still unpaid, the said Titus did, by his endorsement, signed with his own proper hand, appoint and order

2d Ind. ass.

3d Endorsed note.

the said James to pay to the said John the said sum of £20, according to the tenor and effect of said note; and all which the said James, to wit, at Rutland aforesaid, on the day and year last aforesaid, had notice; whereupon the said James became liable in law to pay to the said John the aforesaid sum of £20, according to the tenor and effect of said note; and being so liable, the said James afterwards, to wit, at Rutland aforesaid, on the day and year last aforesaid, did, in consideration thereof, assume upon himself, and to the said John faithfully promise to pay to him the aforesaid sum of £20, according to the tenor and effect of said note. And the said John says, the said sum of £20 last aforementioned, was due and payable from the said James, before the commencement of the present action of the said James. Nevertheless the said James, his pomises and assumption aforesaid not regarding, hath never performed the same, or either of them, to the damage of the said John the sum of £60, lawful money; the said John therefore prays that the same may be offset against the demand of the said James, and that he, the said John, may recover the balance which shall be found due to him from the said James, according to the statute in such case made and provided.

Plaintiff's plea as to the first and second counts.

And the said James, by H., his attorney, as aforesaid, pleads and says, that as to the first and second counts in the plea of offset of the said John, he did not assume and promise in manner and form as the said John hath therein alledged, and hereof he puts himself on the country. And the said John doth likewise.

Plea to the 3d count.

And as to the third count in the said plea of offset of the said John, he says that the said John ought not to recover thereof against him, the said James, because, he says, that after the making of the said promissory note, in the said third count mentioned, and before any

endorsement thereof by the said Titus Thompson, to wit, on the first day of June, in the year of our Lord 1791, he, the said Titus, at Rutland aforesaid, by his certain deed, then and there made by the said Titus to to the said James (which said deed of the said Titus, signed with his hand and sealed with his seal, the date whereof is the same day and year last aforesaid, the said John brings into Court here), did remise, release and forever quit claim to the said James, by the name of James Jinks, of Pittsford, in the County of Rutland, his heirs, executors and administrators, all and all manner of action and actions, cause and causes of action, suits, notes, bills, bonds, writings obligatory, debts, duties, accounts, sum or sums of money, judgments, executions, controversies, trespasses, damages and demands, of what name or nature soever, which he, the said Titus, ever had, or might hereafter claim, challenge or demand, by reason of any matter, cause, or thing whatever, from the beginning of the world, to the day of the date of said deed, as by the said deed, relation being thereunto had, may more fully appear. And the said James further says, that at the time of making the said deed of the said Titus, as aforesaid, the said promissory note, mentioned in the said third count of the plea of the said John above pleaded, was in the custody and possession of the said Titus, not endorsed by him, and this the said James is ready to verify. Wherefore he prays judgment, whether the said John ought to recover against him, the said James, on the count last aforesaid.

Further plea, 1st count, debt on bond.

And for further plea he saith, that the said John is further indebted to him, the said James, in divers large sums of money; for this, to wit, that on the first day of September, in the year of our Lord 1791, the said John Simpson, by his certain writing obligatory, signed by the hand, and sealed with the seal of the said John,

and ready to be shown to the Court, did acknowledge himself to be holden and firmly bound to the said James, in the sum of £40, lawful money, to be paid to the said James, by the said John, when he, the said John, should be afterwards thereunto requested.

2d. On judgment.

And also for this, to wit, that whereas at a County Court holden at Rutland, in and for the County of Rutland, on the third Tuesday of November, in the year of our Lord 1791, the said James, by the consideration and judgment of said Court, recovered against the said John, by the name of John Simpson, of Rutland, in the County of Rutland, the sum of twenty pounds, lawful money, for damages which he had sustained by reason of a certain trespass of him, the said John, heretofore done to the said James, as well as for his costs and charges, by him in that behalf expended; whereof the said John has been convicted, as by the record and proceeding thereof still remaining in the said Court, more fully appears; which said judgment still remains in said Court in its full force, strength, and effect, never reversed, annulled, set aside, paid, satisfied or discharged; and the said James hath not yet obtained any execution on his said judgment; whereby an action hath accrued to the said James, to have of and from the said John, the aforesaid sum of £20. Nevertheless the said John hath never paid or satisfied to the said James the aforesaid sums, or either of them. But the same, being £60 in the whole, is still due and owing from the said John to the said James; which he prays may be set off against the demand of the said John, in his plea of offset above pleaded; and that he, the said James, may recover the balance thereupon due to him, according to the statute in such case made and provided.

Deft's rep.

And the said John, by his said attorney, farther

pleads and says, that for anything in the plea of the said James, in bar above pleaded, he, the said John, ought to recover on the said third count contained in his plea in offset above pleaded, because, he says, that the said James, on the first day of May, in the year of our Lord 1791, did make and deliver to the said Titus Thompson, his certain note in writing, commonly called a promissory note, subscribed with his hand, and bearing date the day and year last aforesaid; in and by which said note, the said James promised the said Titus to pay to him, or to his order, the said sum of £20, within one month after the date of said note, with lawful interest for the same; and the said Titus did afterwards, to wit, on the first day of July, in the year of our Lord 1791. appoint and order the said James to pay to the said John the aforesaid sum of £20, according to the tenor of said note, of which the said James had notice, and became liable, and did assume and promise to the said John, the same sum of £20, according to the tenor of said note.

Traverse.

And the said John, in fact, says that the said Titus did not make and execute the said deed of release to the said James, on the said first day of June, in the year of our Lord 1791, or at any other time before the endorsement of the said note to the said John; and hereof he puts himself on the country for trial.

Plea to the 1st count of the plaintiff in offset. Oyer of the bond and condition.

And as to the first count contained in the plea of offset by the said James above pleaded, the said John pleads and prays oyer of the said writing obligatory, which is read to him in the following words, to wit, (*here insert the bond*). And he also prays oyer of the condition of the writing obligatory, which is read to him in the following words, to wit (*here insert the condition*), which being read and heard, he says that the said James ought not to recover thereof against

Payment the day, in ba..

him, because, he says, that he, the said John, on the —— day of ———, in the said condition above specified, paid to the said James the sum of £20, lawful money, which he, the said John, ought to have paid to the said James upon that day, according to the form and effect of the said condition, to wit, at Rutland aforesaid, and this he is ready to verify; wherefore he prays judgment if the said James ought to recover thereof against the said John.

To 2d count all debet.

And as to the second count in the said plea of offset of the said James, he says, that he does not owe the said James in manner and form as the said James therein hath alledged, and hereof puts himself on the country for trial. And the said James doth likewise.

Replication to the plaintiff's plea in bar.

And the said James, by his attorney, replies to the plea of the said John, in bar above pleaded, and says, that for anything therein alledged, he ought to recover thereof against him, the said John, because, he says, that the said John, on the first day of September, in the year of our Lord 1791, did, by his certain writing obligatory, signed by his hand, and sealed with his seal, the date whereof is the day and year last aforesaid, acknowledge himself holden and firmly bound to the said James, in the sum of £40, lawful money, to be paid, etc. And the said James, in fact, says that the said John did not on the said —— day of ———, in said condition specified, nor on any other day, either before or since that time, pay to the said James, the said sum of £20, which he, the said John, ought to have paid to the said James, upon that day; and hereof he puts himself on the country for trial. And the plaintiff likewise.

Traverse.

Issue.

Wherefore, let a jury come, who are neither of kin to the plaintiff or defendant, to recognize between the said parties on the issues aforesaid; and afterwards, to

Jury awarde

wit, at the same County Court, holden at Rutland, within and for the County of Rutland, on the said third Tuesday of November, in the year of our Lord 1791, come the jurors of the jury above mentioned, to wit, (*here, in making up the record, the names of the jurors are to be inserted*) good and lawful men of the County of Rutland aforesaid, and being tried, are sworn upon that jury, to give a true verdict of the matters aforesaid, who, upon their oaths, say they find for the plaintiff to recover of the defendant the sum of £40, lawful money for his damages, and to recover his costs. Verdict.

Whereupon it is considered by the Court here, that the plaintiff recover of the defendant the aforesaid sum of £40, lawful money, damages, and his cost, by the Court here taxed at £4 10s. 6d., and thereof he may have execution. Judgment.

Scire Facias against Bail, on Mesne Process.

ALSTEAD *vs.* GOODMAN AND JEYKIL.

RUTLAND COUNTY. } WHEREAS, Abel Alstead, of Clarendon, in the County of Rutland, heretofore, to wit, at Rutland, in said county, on the 24th day of October, in the year of our Lord 1791, took out a writ of attachment against Peter Penniless, of Pittsford, in said county, at the suit of him, the said Abel, in an action of the case, on promises, demanding damages the sum of £50, which said writ was signed by N. O., then, and still Clerk of the County Court for the County of Rutland aforesaid, bearing date the day and year last aforesaid, and made returnable to the County Court, then next to be holden at Rutland, in and for said County of Rutland, on the 3d day of November,

in the year of our Lord 1791; and the said Abel delivered the same writ to Jonathan Bell, then, and still Sheriff of said county, to serve and return according to law; and afterwards, to wit, on the day of ——, at ———, in the county aforesaid, the said Jonathan Bell, sheriff, as aforesaid, thereon arrested and took the body of the said Peter, at the aforesaid suit of the said Abel; and the said Peter being so arrested, and in custody of the said Jonathan Bell, sheriff, as aforesaid, George Goodman and Justus Jeykil, both of said Pittsford, became bail and surities for the said Peter, that he should appear in said suit of the said Abel, as aforesaid, and respond the judgment, which should be therein obtained, if any, by endorsing their names, severally, with their own hands, on the back of said writ, according to the form and effect of the statute in such case made and provided; and the said writ being legally returned to said County Court, holden at Rutland, in and for the County of Rutland aforesaid, the said suit was continued until the County Court, held Rutland, in and for the county aforesaid, on the —— day of March, in the year of our Lord 1792, at which Court the said Abel, then and there, by the consideration and judgment of the said Court, recovered against the said Peter, in the suit aforesaid, the sum of £40 for his damages, and the sum of £4 10s. for his costs in and about his said suit; and afterwards, to wit, on the 25th day of March, in the year of our Lord 1792, and within thirty days after the rendering of the judgment aforesaid, the said Abel prayed out his writ of execution on said judgment, against the said Peter, dated the day and year last aforesaid, and signed by N. O., Clerk of said Court, returnable within sixty days from the date last aforesaid, and delivered the same writ of execution to Jonathan Bell, then, and still sheriff of said county, to levy, serve and return,

according to law; and afterwards, to wit, at Rutland aforesaid, on the 10th day of May, in the year of our Lord 1792, and within sixty days next after the rendering of the judgment aforesaid, the said Jonathan Bell, sheriff, as aforesaid, returned the said writ of execution into the office of the clerk of said County Court, with a return legally thereon endorsed, that he could find neither body nor estate of the said Peter, within his county, wherewith to satisfy said writ of execution; and the judgment aforesaid yet remains in full force, not reversed, annulled, set aside, or in any wise paid or satisfied to the said Abel; whereof the said Abel hath supplicated a proper remedy to be provided for him in that behalf.

To the end, therefore, that justice may be done, you are hereby required by the authority, etc., to make known to the said George Goodman and Justus Jeykil, that they be before the County Court, next to be holden at Rutland, in and for the County of Rutland, on the —— day of November, in the present year of our Lord 1792, to show cause, if any they have, wherefore the said Abel should not have execution against them, for his damages, (*or debt, as the case may be*) and cost as aforesaid, according to the form, force and effect of the statue in such case made and provided; and farther, to do and receive that, which the said Court shall then consider of them in this behalf: hereof fail not, etc. Dated at Rutland, this 5th day of June, in the year of our Lord 1792.

E. M., *Judge.*

Plea to the above, that Bail rendered the body of the principal in Court.

And now the said George Goodman and Justus Jeykil. by H., their attorney, come into Court here, plead and say, that the said Abel ought not to have execution against them for his damages and cost aforesaid, because, they say, that after the said George and Justus became sureties for the appearance of the said Peter, as in the said writ of *scire facias* of the said Abel is supposed, and before the rendering of judgment against the said Peter in the suit of the said Abel, as aforesaid, to wit, at a County Court holden at Rutland, in and for the County of Rutland, on the 3d day of November, in the year of our Lord, 1791, the said George and Justus did, setting the said Court, render up the body of the said Peter in said Court, in discharge of themselves, as sureties for the appearance of the said Peter, in the aforesaid suit of the said Abel; and the said Peter was, by the order of said Court, then and there received into custody of an officer of said Court, on the aforesaid suit of the said Abel, and a record of the said render made in said Court; as by the records and proceedings of the said Court here may more fully appear, and this they are ready to verify; wherefore they pray judgment, whether the said Abel ought to have execution against them for his damages and costs aforesaid.

Declaration on a Prison Bond, by the Assignee of the Sheriff.

SIMON SEARS *vs.* RICHARD ROE.

_____ to answer to Simon Sears, of Rutland, in the County of Rutland, assignee of J. B., Sheriff of said County, in a plea, that to the said

Simon the said Richard Roe render the sum of £100, lawful money, which he owes and unjustly detains, for this, to wit, that, whereas, at a County Court holden at Rutland, in and for the County of Rutland, on the 3d day of November, in the year of our Lord, 1791, the said Simon, by the consideration of said Court, recovered judgment against Timothy Rolls, of Ira, in said county, for the sum of fifty pounds, lawful money, for his damages, which he had sustained by reason of the non-performance of certain promises, and for the sum of £1 10s. 6d. for his costs, in and about his suit in that behalf laid out and expended; and afterwards, to wit, at Rutland aforesaid, on the 25th day of November, in the year of our Lord 1791, aforesaid, the said Simon took out a writ of execution against the said Timothy, in due form of law, on the judgment aforesaid, dated the day and year last aforesaid, signed by N. O., clerk of said Court, and returnable within sixty days from the date aforesaid, and delivered said writ of execution to J. B., then, and still Sheriff of said county, to levy, serve, and return, according to law; and afterwards, to wit, at Rutland aforesaid, on the 2d day of January, in the year of our Lord 1792, the said J. B., then being sheriff, as aforesaid, for want of goods and estate of the said Timothy, whereof to levy the debt aforesaid, by virtue of said writ of execution, and according to the precept thereof, arrested and took the body of the said Timothy, and him committed to the gaol of said county, within the said prison, until he should pay and satisfy to the said Simon, his damages and costs aforesaid, as by the said writ he was commanded; the said J. B. then and still being, by virtue of his said office of sheriff of said county, keeper of the aforesaid prison; and the said Timothy being so imprisoned, in the custody of said sheriff, within said prison, for the debt of the said

Simon, as aforesaid, was afterward, to wit, at Rutland aforesaid, on the day and year last aforesaid, admitted to the liberties of said prison, by the sheriff aforesaid, and on that occasion, and as security for the said Timothy to indemnify the said sheriff against any escape, or other unlawful act of the said Timothy, whereby the said sheriff should be subjected to damages, by reason of the said Timothy being admitted to the liberties of the prison as aforesaid, the said Richard, by his certain writing obligatory, signed with his hand, and sealed with his seal (and ready to be shown to the Court), the date whereof is the same day and year last aforesaid, became holden and firmly bound to the said J. B, then, and still sheriff, as aforesaid, in the sum of £100, lawful money, to be paid to the said sheriff, or to his assigns, when he should be afterwards thereunto requested, under the following condition:— If the said Richard should indemnify and save harmless the said sheriff against any escape of the said Timothy, then a prisoner for the cause aforesaid, and against any other unlawful act of the said Timothy, whereby the said sheriff might be subjected to damages in the premises, by occasion of the said Timothy being admitted to the liberties of the said prison, as aforesaid, then the said writing obligatory to be void, otherwise of force; as by the said writing obligatory, and the condition thereof (relation thereto being had), will more fully and at large appear; and the said Simon saith, that after the admission of the said Timothy to the liberties of the prison as aforesaid, and after the making of the said writing obligatory, to the said sheriff by the said Richard, as aforesaid, to wit, at Rutland aforesaid, on the 10th day of January, in the year of our Lord 1792, the said Timothy, having never paid to the said Simon his debt, as aforesaid, nor been in any way legally liberated or discharged from his

imprisonment, aforesaid, for the debt of the said Timothy, as aforesaid, did escape from the said prison, and the liberties thereof, and go at large, whether he would; whereby the said sheriff became liable to pay to the said Simon his debt aforesaid, for which the said Timothy was committed to prison, as aforesaid, and was thereby subjected to loss and damage; by reason whereof, the writing obligatory, aforesaid, became forfeited. And, *whereas* the said J. B., so being sheriff, as aforesaid, afterwards, and before the payment of the said one hundred pounds, contained in the said writing obligatory, or any part thereof, to wit, on the fifth day of February, in the year of our Lord 1792, at Rutland aforesaid, at the request of the said Simon, the creditor, for whose debt the said Timothy was committed to prison, as aforesaid, according to the form, force and effect of the statute in such case made and provided, in due manner, did assign and set over the said writing obligatory, to the said Simon, by writing, under the hand and seal of the said sheriff, endorsed on the said writing obligatory, as by the said assignment endorsed on the said writing obligatory, and ready to be shown to the Court, the date whereof is the day and year last aforesaid, more fully appears; by reason of which said premises, and by force of the statute in such case made and provided, an action hath accrued to the said Simon, as assignee of the said J. B., sheriff, as aforesaid, to have and recover of the said Richard the aforesaid sum of £100; and yet the said Richard, although often thereto requested and demanded, hath never paid the said sum of £100, or any part thereof, to the said sheriff, before the said assignment, or to the said Simon, since the assignment; but hitherto hath refused to pay the same to the said sheriff, or to the said Simon, and still doth refuse to pay the same to the said Simon to his damage, etc., and to recover his, said debt, damages and just cost, he brings this suit.

Special Plea to the Foregoing Declaration.

And now the said Richard Roe, by S. H. his attorney in Court, here pleads and says, that the said Simon, from having and maintaining his said action, thereof against him, the said Richard, ought to be barred, because he says that after the commitment of the said Timothy to the said prison for the debt of the said Simon, as aforesaid, and after the making of the said writing obligatory, by the said Richard, as aforesaid, the said Timothy having at all times then before kept within the liberties of said prison, to wit, on the 10th day of January, in the year of our Lord 1792, the said Simon, with intent wrongfully to charge the said Richard with the said debt, did, at Rutland aforesaid, persuade, entice and procure the said Timothy to go at large out of the liberties of said prison, and the said Timothy, to wit, at Rutland aforesaid, on the day and year last aforesaid, did, by the enticement, persuasion, procurement, and consent of the said Simon, go at large, out of the liberties of the prison aforesaid; which is the same going at large and supposed escape of the said Timothy, in the declaration of the said Simon above alleged, and this he is ready to verify; wherefore he prays judgment, if the said Simon from having and maintaining his said action against him, ought not to be barred.

Recognizance of Bail taken in Court.

RUTLAND, ss., COUNTY COURT, — *day of* ——.

JAMES JINKS, *vs.* JOHN DOE.

Be it remembered, That in the term of November, in the year of our Lord 1792, appeared John Doe, of Rutland, in said county, principal, and Richard Roe and Robert Lilly, of Rutland aforesaid, bail, and ac-

knowledged themselves jointly and severally inbebted to James Jinks, of the same place, in the sum of £100 lawful money, to be levied of their, and each of their goods and chattels, lands and tenements, and for want thereof, on their bodies, if default be made in the condition following:

The condition of the above recognizance is such, that if the defendant, John Doe, shall be condemned in the action, and shall pay the condemnation money, or render himself a prisoner on the writ of execution thereupon to be issued, then the above recognizance to be void, otherwise of force.

Taken and acknowledged in Court, this
[SEAL.] 22d day of November, in the year of our Lord, 1791.

N. O., *Clerk.*

Bail-piece on the Above.

RUTLAND SS., COUNTY COURT, — *day of* ——.

JAMES JINKS *vs.* JOHN DOE,

On a writ of attachment, at the suit of James Jinks, of Rutland, in said county, against John Doe, of said Rutland, in a plea of debt of £50. The bail are Richard Roe, of said Rutland, and Robert Lilly, of the same place.

The party himself, and the bail, jointly and severally in the sum of £100.

Taken and acknowledged in Court, the
[SEAL.] 22d day of November, in the year of our Lord, 1791.

N. O., *Clerk.*

As by the laws of this State, the bail on the original writ stand in the place of special bail, and have a right pending the suit, or before judgment be rendered on

the *scire facias*, to bring in the principal, in discharge of themselves; it is conceived that the following will be a proper form of a bail-piece, to be given by the sheriff, before the return of the writ, or by the Clerk of the Court, after the return, with some little alteration:

Bail Piece by the Sheriff.

JAMES JINKS *vs.* JOHN DOE.

RUTLAND COUNTY. } On a writ of attachment, at the suit of James Jinks, of Rutland, in said county, against John Doe, of the same place, in a plea of debt of £50, returnable to the County Court, to be holden at Rutland, on the —— day of ———, in the year of our Lord 1791.

The aforesaid John Doe is arrested, and the bail are William Wise, of Clarendon, in said county, and John Jocelin, of the same place.

By them endorsed on the writ, the 2d day
[L.S.] of October, in the year of our Lord 1791.
J. B., *Sheriff.*

Return of an Officer to a Writ of Execution levied on Land.

RUTLAND COUNTY, SS. } *Know all men by these presents*, That I, J. B., Sheriff of the County of Rutland, by virtue of the within writ of execution to me directed, and by the direction of J. W., the creditor within named, did, at ——, in said county, on the — day of ——, in the year of our Lord 17—, levy the said writ of execution on a certain tract or parcel of land, shown to me by the said J. W., as the property of B. G., the within named debtor, situate, lying and being in —— aforesaid, and bounded as follows, to

wit: Beginning (*here insert the bounds of the land as set off*), and afterwards, to wit, at —— aforesaid, on the day and year last aforesaid, I caused the same land, with the appurtenances thereof, to be appraised by P. P., I. N. and I. S., good and lawful freeholders of the vicinity, chosen, appointed, and sworn as the law directs, who, on their oaths, have appraised the same at the sum of £10 10s. 5d., lawful money, to full satisfaction of the within writ of execution, and the legal cost thereon arising, as stated in the bill hereunto annexed, and on the same — day of ——, in the year of our Lord 17—, I delivered possession of the above described premises to the said J. W., and caused him to become seized thereof.

In witness whereof I have hereunto subscribed my name, and affixed my seal, the day and year above contained.

J. B. [SEAL.]

Record of a Cause before a Justice of the Peace, on a Note, with Several Pleas of Offset and Appeal.

RUTLAND COUNTY. } *Be it remembered*, That at a Justice's Court, holden at Rutland, in the County of Rutland, on the 3d day of October, in the year of our Lord, 1791, before N. O., Justice of the Peace for the County aforesaid, E. B., of Rutland aforesaid, was summoned (*or attached*) to answer to J. S., of the same place, in an action of the case on note; *Whereupon* the plaintiff in Court complains, that the defendant, in and by his certain note in writing under his hand, bearing date the 4th day of May, in the year of our Lord 1790, and now exhibited to Court, promised

On note.

the plaintiff, for value received, to pay to him the sum of £3, lawful money, with interest, on the first day of October then next; which promise the defendant hath not performed, though often requested, to the plaintiff's damage £4, for which he brings suit.

Defendant's plea, did not promise.

And the defendant in Court pleads and says, that he did not promise as the plaintiff hath alleged, and hereof puts himself on a jury of the country for trial. And he further says that the plaintiff is indebted to him in divers sums of money; for this, to wit, that on the fifth day of January, in the year of our Lord 1791, and before the commencement of the present action, the plaintiff being indebted to the defendant in the sum

Offset 1st, for money had and received.

of £2 5s., for so much money had and received to the use of the defendant, at the instance and request of the plaintiff, he, the plaintiff, did promise to pay to the defendant the said sum of £2 5s. when he should be requested.* And also for this, that the plaintiff, on the fourth day of March, in the year of our Lord, 1791, and before the commencement of his, the plaintiff's action, being indebted to the defendant in the sum

2d. For money laid out and expended.

of £1 2s., for so much money by the defendant laid out and expended for the use of the plaintiff, and at his request, he, the plaintiff promised to pay to the defendant the said sum of £1 2s., when thereto requested. And also, for this, that the plaintiff, in and by his cer-

On Note.

tain note, under his hand, dated the 5th day of May, in the year of our Lord 1791, and now exhibited to the Court, promised the defendant, for value received, to pay to him fifteen shillings lawful money, on demand; which said sum was due and payable before the commencement of the plaintiff's said action. All which said sums are due and owing to the defendant from the plaintiff; he therefore prays the same may be set off

* This form of record for a declaration or plea, will be proper in all cases where one party has, in any way, received money, which he ought in equity and good conscience to pay to the other.

against the plaintiff's demand, and that the defendant may recover the balance thereupon due to him.

And the plaintiff says, that as to the £2 5s. and £1 2s. by the defendant above mentioned, he acknowledges, that he did assume and promise as he hath alleged. And as to the note, by the defendant above mentioned, he says, that he did not promise, and hereof puts himself on a jury of the country for trial.

Pl'ff as to the money, did promise.

To the note did not promise.

And he further says, that the defendant is indebted to him in divers other sums, for this, to wit, that on the first day of June, in the year of our Lord 1790, at the plaintiff and defendant came together, computed and settled their book accounts, and there was found due to the plaintiff the sum of six shillings lawful money, which the defendant then and there acknowledged in writing under his hand; and being therefore liable, promised to pay the same to the plaintiff.—And also for this, to wit, that on the 14th day of July, in the year of our Lord 1790, and before the commencement of the plaintiff's action, the defendant being indebted to the plaintiff, in the sum of 18s. for goods by the plaintiff sold and delivered to the defendant, at his instance and request, promised to pay to the plaintiff the said sum of 18s. when requested; yet he hath not performed his said promises, but the sums aforesaid are now due and owing to the plaintiff; he therefore prays that the same may be set off against the aforesaid demands of the defendant, and he the plaintiff may recover the balance, etc.

Pl'ff in offset, 1st on settled account.

2d Goods sold.

And the defendant says, as to the several demands of the plaintiff in offset, last above mentioned, he did not promise as the defendant hath alleged; and of this he puts himself on a jury of the country for trial. Wherefore it is awarded that a jury immediately come, good and lawful men of the vicinity, who are of kin neither to the plaintiff nor defendant, for the trial of

Defendant did not promise.

Jury.

the issues aforesaid, between the parties aforesaid; and afterwards, to wit, on the same 3d day of October, 1791, come the jurors of the jury aforesaid, to wit, A. M., S. T., I. K., P. N., D. S., and E. L., good and lawful men, and are sworn upon that jury, to give a true verdict between the parties aforesaid; who, upon their oaths, say, that they find for the plaintiff to recover of the defendant, the sum of £3 lawful money, damages, and his costs: wherefore, it is adjudged by the said Justice, that the plaintiff recover of the defendant the said sum of £3 lawful money, and the sum of 18s. for his costs in and about this suit.

Verdict.

And now the defendant, within two hours after the rendering of the aforesaid judgment, prays that an appeal may be granted him, in the matters aforesaid, to the county court, next to be holden at Rutland, in and for the county of Rutland, on the — day of November, in the present year of our Lord 1791. It is thereupon ordered that the defendant be allowed his appeal.

Appeal.

The defendant as principal, and W. S. & I. K., as sureties, recognized to the plaintiff in the sum of £20 for the prosecution of the said appeal, in due form of law.

The foregoing is a true copy from the record with a minute of the recognizance, examined by

[L.S.]

N. O. *Justice of Peace.*

A copy of the writ should be annexed.

N. B.—The form used in a plea of offset, will serve as the form of a declaration in all cases of a similar nature.

Trespass, Assault and Battery.

Be it remembered, That at a Justice's court, holden at Rutland, on the 10th day of May, in the year of our

Lord 1792, before N. O., justice of the peace for said county, A. S., of said Rutland, was attached, to answer to P. P., of the same place, in a plea of trespass, with force and arms, whereupon the plaintiff before the court, complains, that at Rutland aforesaid, on the 2d day of May instant, the defendant did an assault make upon the body of the plaintiff, and him beat, bruise, wound and evilly entreat, while he the said plaintiff was in the peace of the state, and about his own business; to his damage, as he says, £4 lawful money; to recover which he brings suit. And on the same 10th day of May comes here the defendant, and says, that he is not guilty, as the plaintiff against him hath alleged, and of this he submits to the said justice for trial, and the plaintiff doth the same. Whereupon the said justice having duly heard and considered the proofs and allegations of said parties, finds that the defendant is not guilty, as the plaintiff hath alleged, and therefore adjudges that the defendant be thereof acquitted, and that he recover of the plaintiff his costs in and about this suit by him expended, taxed by the said justice at 15s. and thereof he may have execution.

N. O. *Justice of Peace.*

Action on Book Account.

Be it remembered, That at a Justice court, holden at Rutland, in the county of Rutland, on the 4th day of June, in the year of our Lord 1792, before N. O., justice of the peace for said county, D. H. of Pittsford, in said county, was summoned to answer to M. P. of Rutland aforesaid, in an action on book account, whereupon the plaintiff, here in court complains, that before the 24th day of May, last past, the defendant was in-

debted to the plaintiff on book, to balance book accounts, the sum of £3 lawful money, which he has never paid, to the plaintiff's damage £4.

And the defendant here in court says, that he does not owe the plaintiff as he hath alleged, and he further says, that there is subsisting between the plaintiff and defendant mutual accounts, yet unsettled, he therefore prays that the same may be tried by a jury of the country; wherefore, it is ordered that a jury immediately come, good and lawful men of the country, who are of kin neither to the plaintiff nor to the defendant, to recognize between the said parties in the matters aforesaid. Afterwards, to wit, on the same 4th day of June, in the year of our Lord 1792, aforesaid, come the jurors of the jury aforesaid, to wit, A. R., etc., good and lawful men, and are sworn upon that jury, to give a true verdict between the parties aforesaid, who upon their oath say, that the defendant is indebted to the plaintiff, the sum of 10s. to balance their book accounts, they therefore find for the plaintiff to recover of the defendant, the aforesaid sum of 10s. lawful money and his costs. Whereupon it is adjudged and ordered, by the said justice, that the plaintiff recover of the defendant, the aforesaid sum of 10s. and his costs, taxed at 18s. lawful money, and thereof he may have execution.

N. O. *Justice of Peace.*

On note, the defendant being out of the State.

RUTLAND COUNTY. } *Be it remembered*, That at a justice's court, holded at Rutland, in the County of Rutland, on the 7th day of August, in the year of our Lord

1791, C. D., of was by his property attached to answer to A. S., in an action on note, whereupon the plaintiff here in court complains, that the defendant in and by his certain note in writing, under his hand, dated the 27th day of April, in the year of our Lord 1790, and now exhibited to the court, promised the plaintiff to pay to him, for value received, the sum of £2 4s. lawful money on demand, with interest; yet the defendant hath never performed his said promise, to the plaintiff's damage as he saith, the sum of £3 to recover which he brings suit.

And because it appears to the said justice here, that the defendant at the time of serving the writ of the plaintiff in this action, was absent out this state, and hath not returned within the same, since that time, it is therefore ordered that this court, with the action aforesaid, be adjourned until the 30th day of this instant August, at 2 of the clock, afternoon of said day, at this place; at which day comes the plaintiff, and because the said defendant hath not returned within this state, and it doth not appear that the said defendant hath had any notice of the plaintiff's said action, commenced against the defendant as aforesaid; it is therefore ordered that this court, with the action aforesaid, be further adjourned, until the 25th day of September now next, at 2 of the clock afternoon of said day, at this place; at which day comes the plaintiff, and the defendant being three times solemnly called, doth not come, but therefore maketh default; whereupon it is adjudged and ordered by said justice, that the plaintiff recover of the defendant the sum of £2 9s. damages, and the sum of 8s. 6d. for his costs, and hereof he may have execution.

N. O. *Justice of Peace.*

The Declaration in Trover is, by reason of the fiction, too intricate to be introduced into justice records. It is conceived that the following form, which contains the substantial part of the pleadings in that action, may well be adopted.

RUTLAND COUNTY. } *Be it remembered*, That at a justice's court, holden at Rutland, in the county of Rutland, on the 17th day of November, in the year of our Lord 1791, before N. O., justice of the peace for said county, John Brian, of said Rutland, was summoned to answer to James Morey, of the same place, in an action on the case; wh-reupon the plaintiff here in court complains, that at Rutland aforesaid, on the 23d day of October last past, the defendant took and detained from the plaintiff, one certain two year-old steer, of a red color, the property of the plaintiff, of the price and value of £3, and did, at Rutland aforesaid, on the day and year last aforesaid, without law or right, convert the steer aforesaid to the defendant's use—to the plaintiff's damage, as he says, £3, to recover which, he brings suit.

And the defendant, because he is not prepared for his defence in that behalf, prays that this action may be adjourned until the 25th day of instant November. Whereupon it is ordered by the said justice, that this court, with the said action, be adjourned until the 25th day of instant November, at 9 of the clock in the forenoon of said day, at this place. And the same time is given to the parties aforesaid. At which day come the said parties, and the defendant pleads and says, that he is not guilty as the plaintiff hath alleged, and hereof puts himself on a jury of the country for trial; wherefore it is awarded that a jury immediately come, etc.

Recognizance in an Appeal, certified at large. [See p. 132, ante.]

RUTLAND COUNTY. } *Be it remembered*, That on the 3d day of October, in the year of our Lord 1791, before N. O.. justice of the peace for the county aforesaid, personally appeared E. B., of Rutland, in said county, principal, and J. G. and S. F., of the same place, sureties, and acknowledged themselves jointly and severally indebted to J. S., of said Rutland, in the sum of £20 lawful money, to be levied of their, and each of their goods and chattels, lands and tenements; and for want thereof, on their bodies, if default be made in the condition following:

The condition of the above recognizance is such that if the said E. B. shall prosecute his appeal now prayed out against J. S., to effect, and answer and pay all intervening damages occasioned by reason of the delay, to the said E. B., with additional costs, in case judgment be affirmed, then this recognizance to be void, otherwise of force.

Taken and acknowledged this 3d day of
[L.S.] October, in the year of our Lord 1791, before

N. O. *Justice of Peace.*

A Recognizance to be sent up by a Justice of the Peace, in a Criminal Prosecution.

RUTLAND COUNTY. } *Be it remembered*, That on the 24th day of June, in the year of our Lord 1792, before N. O , justice of the peace for the county of Rutland, personally appeared L. I., of Rutland, in said county, principal, and E. P. and J. O., of the same place, sureties, and acknowledge themselves jointly and severally indebted to the Treasurer of the State of

Vermont, in the sum of £500 lawful money, to be levied of their, and each of their goods and chattels, lands and tenements; and for want thereof, on their bodies, if default be made in the condition following:

The condition of the above recognizance is such, that if the above named L. I., charged before me with having counterfeited, and assisted in counterfeiting the current coins of this State of Vermont, shall make his personal appearance before the supreme court, to be holden at Rutland, in and for the county of Rutland, on the 2d Tuesday of August now next, and answer to the matters and things, which shall then and there be objected to him in this behalf, shall abide the order of the said supreme court, and not depart without leave of the same, then this recognizance to be void, otherwise of effect.

Taken and acknowledged this 4th day of
[L.S.] August, in the year of our Lord 1791, before

N. O. *Justice of Peace.*

Recognizance for a Witness to appear and testify.

RUTLAND COUNTY. } *Be it remembered*, That on the 24th day of June, in the year of our Lord 1792, before N. O. justice of the peace for the county of Rutland, personally appeared T. T. of Rutland, in said county, and acknowledged himself indebted to the Treasurer of the State of Vermont, in the sum of £30 lawful money, to be levied of his goods and chattels, lands and tenements, and for want thereof, on his body, if default be made in the condition following:

The condition of the above recognizance is such, that if the above named T. T., shall appear before the supreme court to be holden at Rutland, in and for the county of Rutland, on the 2d Tuesday of August now

next, to testify his knowledge in a certain prosecution in behalf of the State of Vermont against L. J. of — and shall not depart without the leave of said court, then this recognizance to be void, otherwise of force.

Taken and acknowledged this 24th day of
[L.S.] June, in the year of our Lord 17.2, before

N. O. *Justice of Peace.*

Record of a Criminal Prosecution before a Justice of the Peace.

STATE OF VERMONT, *vs.* C. D.

RUTLAND COUNTY. } *Be it remembered*, That at a justice's court, holden at Rutland, in the county of Rutland, on the 16th day of February, in the year of our Lord 1792, before N. O. justice of the peace for said county, C. D. of was brought to answer to complaint exhibited to the said justice by A. K., one of the grand-jurors for said county, who complains that at Rutland, aforesaid, on the 12th day of February instant, the said C. D. did, with force and arms, an assault make upon the body of one I. P. of said Rutland, the said I. P. then being in the peace of the state, and about his own lawful business, and did then and there beat, bruise, wound and evilly entreat the said I. P., and other wrong, then and there did against the peace and dignity of the state; and the said C. D. being put to answer to said complaint, pleads and says that he is not guilty, and puts himself on a jury of the country for trial; wherefore it is awarded that a jury immediately come, good and lawful men of the vicinity, to make deliverence between the State of Vermont and the said C. D. And afterwards, to wit, at Rutland aforesaid, on the same 16th day of February aforesaid,

come the jurors of the jury above mentioned, to wit, A. B., etc., good and lawful men of the vicinity, and are sworn on that jury to make true deliverance between the State of Vermont and the said C. D.; who on their oaths, say, that the said C. D. is guilty of the facts charged against him in said complaint. Wherefore the said justice doth adjudge and sentence the said C. D. to pay a fine of 15d. lawful money, to the treasurer of the said town of Rutland, and costs of this prosecution, taxed at 19s. and to stand committed until he have complied with said sentence.

N. O. *Justice of Peace.*

Warrant of commitment on the above sentence.

To the Sheriff, etc.

RUTLAND COUNTY. } *Whereas,* C. D. of was, on the complaint of A. B., one of the grand-jurors for said county, this 16th day of February, in the year of our Lord 1792, before one N. O., Justice of the Peace for said county, duly convicted of an assault and battery on the body of one I. P. of Rutland, in said county, and was thereupon sentenced to pay a fine of 16s. lawful money, to the Treasurer of the town of Rutland, aforesaid, and the sum of 19s. costs of prosecution, and the said C. D. having neglected and refused to perform said sentence. *These are therefore,*

By the authority of the State of Vermont, to command you to take the body of the said C. D., and him commit to the keeper of the gaol in said Rutland, within the said prison, who is hereby commanded to receive the said C. D. and him keep in safe and close custody, until he pay to the treasurer, aforesaid, the sums being £1 lawful money in the whole, and for this

warrant, together with the cost of this commitment, and his own fees, or until the said C. D. be otherwise discharged by due course of law. Hereof you may not fail of this precept and your doing herein make due returns to me according to law.

Given under my hand at Rutland, this 16th day of February, in the year of our Lord 1792.

N. O. *Justice of Peace.*

Warrant of commitment for not finding Sureties.

RUTLAND COUNTY. } *Whereas*, at Rutland, in the county of Rutland, on the 24th day of June, in the year of our Lord 1792, L. I. of said Rutland, was on a charge of having aided and assisted in counterfeiting the current coin of this state, by me, N. O., justice of the peace for the said county, ordered to find good and sufficient sureties, for his appearance before the supreme court, next to be holden at Rutland, in and for said county, on the 2d Tuesday of August, in the year of our Lord 1792, to answer to matters and things, which should then and there be objected to him in that behalf; and the said L. I. having neglected and refused to find sureties for his appearance aforesaid.—*These are therefore*,

By the authority of the State of Vermont, to command you to take the body of the said L. I. and him commit to the keeper of the gaol in said Rutland, within the said prison, who is hereby commanded to receive the said L I. and him keep in safe and close custody, so that he be had to appear before the said supreme court to be holden at Rutland aforesaid, on the 3d Tuesday of August aforesaid, or until he find

good and sufficient sureties for his appearance as aforesaid, or be otherwise discharged by due course of law. Of your duty herein fail not. Make due return of this precept according to law.

Given under my hand at Rutland, the 25th day of June, in the year of our Lord 1792.

N. O. *Justice of Peace.*

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